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IN THE

Supreme Court of the United States

DOMINIQUE K. GANTT, PETITIONER

v.

SECURITY, USA, INCORPORATED.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Dominique Gantt's petition involves several questions of exceptional national importance:

1) Where a private company is subject to the Equal Protection Clause of the Constitution because it fulfills a government function, has the employer violated an employee's right to equal protection by facilitating a non-employee's sexual harassment of her in the workplace?

2) Is a private security company, enforcing federal and state law on federal property, subject to the Equal Protection provision of the Fourteenth Amendment of the United States Constitution?

3) Does tort law require that the tortfeasor intend the precise injuries suffered in order to be held liable for the injuries inflicted by the tortuous conduct?

4) May a person who aids and abets another in gaining access to his victim be held liable for the emotional distress suffered by the victim who is kidnapped, raped, battered and otherwise tortured by the other person?

The sexual harassment/hostile work environment claims in *Gantt* involve issues of first impression before the Supreme Court with respect to the liability of an employer for sexual harassment of an employee by a non-employee. A body of law addressing sexual harassment by non-employees and issues of safety for women in the workplace has been developing under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et. seq.* Title VII analysis has been

increasingly applied to sex discrimination cases under the Constitution. In addition, stalking laws have been passed by nearly every state in the nation; however, if employers ignore Protective Orders and allow stalkers or other threatening persons access to their intended victims in their workplaces, the laws are meaningless.

The harassment of employees by non-employees in the workplace is one of national interest and concern, particularly with respect to an employer's responsibility to take reasonable steps to prevent physical attacks, as well as verbal sexual harassment, against women employees. Numerous district, circuit and state courts have addressed this issue, following the guidelines of the United States Equal Employment Opportunity Commission (EEOC). The societal interest in furthering equal protection of the law for women and allowing them to work without the fear of being targeted and attacked as women compels guidance by this Court.

In an age of gang violence, workplace violence, violence in federal buildings, domestic violence, stalking, terrorism and conspiracies, the issue of imposing civil liability on persons who aid and abet physical attacks on other persons has risen to one of national importance. *Gantt v. Security, USA* involves a workplace supervisor's knowing and intentional aiding and abetting of a workplace attack upon an employee by a "friend" of the supervisor. Dominique Gantt did everything that a woman is "supposed" to do to protect herself from physical abuse by a man; however, her supervisor, Sgt. Claggett, knowingly and deliberately forced Gantt to assume an assignment making her accessible to her attacker. While she was being kidnapped from her worksite by that attacker, Claggett

further withheld police assistance from her and facilitated the kidnapping.

The issue of liability for Constitutional violations by private entities performing public, or government, functions, is also quite timely. Events after September 11, 2001, have resulted in vastly expanded contracting between the United States government and private security companies, both in and outside of the United States, to fulfill government functions, including military operations at home and abroad, under the supervision and direction of the United States government. The United States Department of Homeland Security is offering, and will continue to offer, many new contracts to private security companies to protect persons and property in government and public buildings. Private security companies are increasingly assuming the public function of policing. It is therefore necessary to clearly set forth the legal responsibilities of those private security companies to hire, train and manage their employees in a manner consistent with the responsibilities of performing a government function. These companies have obligations, as law enforcement officers and peace keepers, not to aid, abet, or otherwise facilitate unlawful conduct, or conduct that is likely to create, incite or facilitate a dangerous, discriminatory or sexually abusive situation in the workplace, as was created by a supervisory employee of Security USA in this case. The decision in *Gantt* at bar will send a message to those private contractor security companies with respect to their hiring, training, compensation and disciplinary policies and practices. The result will affect us all.

The issue of whether a company providing security in a federal building is liable for the intentional torts of its employees, when that conduct jeopardizes lives, is a matter of paramount national importance. The accountability of private security companies to which our government delegates the task of protecting the public, ensuring national security and enforcing the laws of land, are properly before this Court. Accountability translates into higher standards in the future. Tort law already provides a remedy, if the Courts enforce it.

Gantt's petition for *certiorari* offers the Court the opportunity to clarify its holding in *Correctional Servs. Corp. v. Malesko*, 534 U.S. 61 (2001), which limited *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). Until *Malesko*, *Bivens* had been the law of the land for thirty years. Lower courts are currently unclear as to whether how extensively *Malesko* has limited *Bivens*. A misapplication of, or overly broad reading of, *Malesko* could result in the erosion of the Constitutionally guaranteed rights of United States citizens where the federal government has contracted with private companies to perform even uniquely government functions, such as law enforcement and/or military operations.

Particularly since this Court was sharply divided in *Malesko*, Dominique Gantt's Petition offers this Court an opportunity to explore and reconcile the reasoning of all of its Justices, in light of new and different fact patterns, particularly in a post 9-11 society. In *Gantt*, under the Fourteenth Amendment, the Court would consider the actions of state governments, as compared to and contrasted with federal actions, to arrive at a rationale that resolves any perceived conflict between *Bivens* and *Malesko* and

preserves the integrity of the Constitution, as well as the Constitutional rights of the American people.

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The January 23, 2004 Opinion and Order of the United States Court of Appeals for the Fourth Circuit is reported at *Gantt v. Security, USA, Inc.*, 356 F.3d 547, 2004 App. LEXIS 1031, 84 Empl. Prac. Dec. (CCH) P41585, 20 I.E.R. Cas. (BNA) 1618 (4th Cir. 2002) and is reproduced at App. 9a. The December 4, 2002 and January 8, 2001 opinions of the United States District Court unreported, but are reproduced at App. 37a and 52a, respectively. The February 20, 2004 Order of the Court of Appeals for the Fourth Circuit denying Petitioner's timely request for a rehearing *en banc*, or in the alternative, rehearing, is unreported and included at App. 67a.

JURISDICTION

Petitioner invoked the jurisdiction of the Federal Circuit pursuant to 28 U.S.C. § 1291(a) (1), Fed. R. App. Proc., Rule 4(a), the Fifth and Fourteenth Amendments to the United States Constitution, 42 U.S.C. § 1983, and pendent jurisdiction over state claims, pursuant to 28 U.S.C. § 1332. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(a) and Supreme Court Rule 10(a).

JURISDICTION

See Appendix

STATEMENT

I. Facts Giving Rise to Gantt's Causes of Action

Security USA, Inc. is a private security company, certified by "GSA" (the United States General Services Administration), to provide security for federal buildings. In 1996-1997, Security USA was

under contract with the federal government to supply security to the New Carrolton Federal Building, Internal Revenue Service (IRS) Building located at 5000 Ellin Road, Lanham, Maryland (hereinafter, the "IRS Building"), a building owned and operated by the United States government. On December 7, 1996, Earl Wood was the Project Manager and supervisor of the operations of Security, USA at the IRS Building and Dominique Gantt was a security officer. On November 6, 1996, Gantt had sought and obtained an Order for Protection from the Circuit Court for Charles County, Maryland, against Gary Sheppard, her ex-boyfriend. Gantt sought the Order for protection, or restraining order, because Sheppard had assaulted her, harassed her in attempts to re-establish their sexual relationship and threatened her life. The November 6, 1996 Order for Protection specifically ordered that Sheppard "stay away from" Gantt's place of employment, as well her home and not to communicate with her by telephone or in any other manner. On November 7, 1996, Gantt provided Earl Wood with a copy of the Order for Protection against Sheppard for the purpose of putting her employer on notice of Gary Sheppard's threatened harassment and threats of bodily harm to her in the workplace. On November 7, 1996, Project Manager Earl Wood and/or other Security USA supervisors notified all personnel that Gantt was not to be assigned to an outside post due to the threat posed by Gary Sheppard. To protect her from Sheppard, Wood immediately removed Gantt from Post 9, an outside post and re-assigned her to an inside Post, Post 6.

Gary Sheppard was also a federal, GSA certified, security officer. Sheppard worked for Wackenhut Services. Sgt. Angela Claggett worked for Security

USA, Inc. on weekends, as a supervisor and for Wackenhut Services, at the Government Accounting Office (GAO), a federal building, during the weekdays. Claggett and Sheppard were friends. Sgt. Claggett frequently "gossiped" about the relationship between Sheppard and Gantt and portrayed herself to other GSA officers, including Officer Darren Harvey, as a confidant of Gary Sheppard. Sheppard confided in Claggett that he was distraught over his dissolved relationship with Gantt. By November 7, 1996, Claggett had been informed that Sheppard had assaulted Gantt. Claggett was also informed that Sheppard had broken a window and Gantt's mother's house and attempted to enter while Gantt was inside the house. Claggett was aware that Sheppard had told various co-workers that he was intended to kill Gantt, himself, his estranged wife and his children. Claggett was so aware of possible violent acts by Sheppard, particularly toward Dominique Gantt, that Claggett reported Sheppard's threats of violence against Gantt, his family and himself, to Captain Sands of Wackenhut Services, Sheppard's employer.

Sheppard asked Sgt. Claggett to set up a meeting with Gantt for him, saying, "I need to see her." Despite the restraining order, Sheppard's known assaults on Gantt and his threats to kill her, Claggett responded to Sheppard, "You all need to talk." Claggett approached Gantt and attempted to convince her to agree to a meeting between with Sheppard, but Gantt refused, reminding Claggett that she had a protective order against Sheppard, that he had assaulted her, was threatening to kill her, and that she was afraid of him. At some point after November 6, 1996, Claggett transferred a phone call from Sheppard to Gantt while she was

serving on her assigned post. Gantt told Sheppard not to call her and hung up. Gantt experienced severe emotional distress after receiving the phone calls from Sheppard at her assigned post and reported Sgt. Claggett's conduct to Earl Wood.

On Saturday, December 7, 1996, Claggett was the weekend supervisor for Security, USA, Inc. at the IRS Building. Gantt reported to the "Control Room" at 6:00 a.m. Sgt. Willie Jones was ending his shift as supervisor and being relieved by Claggett. Jones reminded Claggett that Gantt was not to be assigned to an outside post. After Jones left the Control Room, Claggett ordered Gantt assume Post #9, outside the building, entering the underground garage. Gantt refused to assume Post #9, reminding Claggett of the restraining order against Sheppard and Wood's instruction that she not be assigned to an outside post. Claggett insisted that Gantt assume Post # 9, despite Gantt's protests. Under the implied threat of being fired for insubordination, Gantt assumed Post # 9. Between 6:10 and 6:15 a.m., Sheppard called Gantt at Post 9. Gantt saw that the phone call from Sheppard was transferred to Post 9 from the Control Room, from Claggett's phone number. Upon receiving the phone call, Gantt became emotionally distraught and feared for her life. Gantt called Claggett and again requested to be reassigned for her safety. Claggett again refused Gantt's request and ordered her to remain at Post #9. At approximately 7:00 a.m., Sheppard appeared at the IRS Building, running toward Gantt at Post 9. Gantt ran from Post # 9, toward an entrance to the IRS Building. Sheppard pulled out a shotgun from his trench coat. With the shotgun drawn and aimed at Gantt, Sheppard chased Gantt through the area surrounding

Post # 9, shouting, "Run! Run!" Sheppard chased Gantt and grabbed her by her arm, pressing the shotgun against her chin and placed her in a "chokehold." Sheppard then dragged Gantt along an outside area of the IRS Building and forced her into his van and onto the floor of the passenger side of the vehicle. Sheppard assaulted and abducted Gantt in the presence of two fellow security guards stationed at the IRS Building. One of them, employed by a company other then Security USA, Inc., immediately reported it to Claggett, in the presence of Officer Darren Harvey, of Security USA, Inc. The officer specifically said that Sheppard had a gun and that he was forcing Gantt off the premises. Some of the officers in the control room saw part of the abduction on one of the surveillance cameras.

When Claggett did not take any action in response to learning of Sheppard's abduction of Gantt, Officer Harvey suggested that they call the police. Claggett replied that there was no need to call the police, adding, "He only wants to talk to her. He's not going to hurt her." Officer Harvey was surprised at Sgt. Claggett's response. Despite her words to her subordinates not to call the police because she did not believe that Sheppard would "hurt" Gantt, Sgt. Claggett actually testified that her first reaction, upon hearing of the abduction, was to be "scared" and that her first thoughts were *about Sheppard* killing Gantt and/or himself and/or *going to jail*; yet, Claggett waited to call the police, and instructed her subordinates not to call the police, while Sheppard was, in fact, "hurting" Gantt. Sheppard sped away from the IRS Building, driving to Delaware, with Gantt held prisoner. Even according to Claggett's own account, she waited at least 5-10 minutes before calling the police after she was notified that Sheppard had abducted Gantt

at gunpoint. Claggett admitted that, based on her training in security, she is specifically aware that 5 minutes – or less -- can mean the difference between life and death when someone has a gun.

Sheppard raped and otherwise tortured Dominique Gantt for six hours, through three states, repeatedly threatening to kill her. Gantt begged for her life, for the sake of her son, for the entire six hours of her captivity. Gantt eventually convinced Sheppard that she would reconcile with him and tell police that she had gone with him willingly. Sheppard finally surrendered to the police. Several hours after the abduction, Claggett was asked by an officer whether she had called Federal Protective Services, as was the appropriate procedure in such situations. Claggett replied that she had not, and, at Officer Harvey's suggestion, called in his presence. Gary Sheppard was convicted of the kidnapping, first-degree rape and violation of the restraining order, based on his acts against Dominique Gantt on December 7, 1996. Gary Sheppard was sentenced to twenty (20) years imprisonment and is still incarcerated.

When Gantt returned to work, she told Project Manager Earl Wood and Internal IRS Investigative Officers Naomi Proctor and Anthony Martin that she believed that Sgt. Claggett had "set her up" to make her accessible to Sheppard by forcing her to assume Post 9 and by failing to immediately call police while Sheppard was assaulting and kidnapping her; yet, Gantt was forced to work under Claggett, who maintained her position as a supervisor and the rank of sergeant. Gantt changed her shift to a less desirable schedule solely to avoid working under Sgt. Claggett. As

a result of the emotional distress of the abduction and rape of December 7, 1996, Gantt continues to experience recurring nightmares, physical anxiety attacks and other physical and mental health issues that have dramatically reduced her quality of life. Gantt has undergone medical and psychological treatment for her physical and mental injuries.

II. *Decision of the Fourth Circuit*

The Fourth Circuit's three judge panel, consisting of Judges Motz, Luttig and Niemeyer, issued three separate opinions. All of the judges on the panel agreed that the trial judge erred, either in her reasoning, her judgment, or both; however, the three judges could not join, in its entirety, any of the three decisions drafted by any one of them. Judge Luttig drafted a strong opinion advocating reversal of the district court's grant of summary judgment to defendant on her entire claim of emotional distress. Judge Niemeyer rejected the district court's reasoning for granting summary judgment, but favored summary judgment for defendant. Judge Motz' opinion is actually a plurality opinion, since no two judges agreed with entire opinion. Judge Motz' opinion appears to be an attempt at a compromise between the two polar opposite opinions of Judges Luttig and Niemeyer; however, as Judge Luttig implies in his dissent, the "majority" opinion is internally inconsistent. Section III. A. of the majority opinion restored Gantt's claim of intentional infliction of emotional distress, in part, reversing the district court's grant of summary judgment to Security USA for emotional distress caused by Sgt. Claggett when she forced Gantt to assume a post that exposed her to Gary Sheppard. App. 9a-14a. Judge Luttig joined Judge Motz in Section

III. A. and Judge Niemeyer dissented. The opinions of Judges Motz and Luttig were completely consistent up until the final paragraph before its holding, in Section III. B. Section III. B. concluded that: 1) the plaintiff must demonstrate that the defendant intended to cause the precise injuries ultimately inflicted upon the plaintiff for the tortuous conduct to characterize the conduct as intentional, and thus, exclude it from the Maryland Workers' Compensation Act, precluding negligence claims against employers by their employees; and 2) the record does not support a conclusion that Sgt. Claggett intended for Gary Sheppard to abduct, assault, batter, rape or otherwise cause severe emotional distress to Dominique Gantt. App. 17a. As Judge Luttig implied, Judge Motz' decision, in Section III. B., deviates from its own previous analysis of the law and facts. App. 31a-34a. Judge Luttig sharply criticized Judge Niemeyer's analysis of the doctrine of vicarious employer liability, stating unequivocally, that Judge Niemeyer "distorts the law of Maryland," with respect to Gantt's claim that Security USA is vicariously liable for Claggett's actions in her capacity as Gantt's supervisor. App. 34a-36a. Judges Motz and Luttig also pointed out that Security USA did not raise a defense with respect to *respondeat superior* on appeal and that Judge Niemeyer therefore had not basis to consider it. App. 34a and 19a, footnote 3. The District Court also concluded that Gantt's equal protection clause was properly dismissed, concluding that: 1) Gantt raised only a Fifth Amendment equal protection claim at the district court level and first raised her Fourteenth Amendment equal protection claim on appeal; and 2) Gantt did not produce sufficient evidence that Security USA was a "state actor." App. 8a-9a.

REASONS FOR GRANTING THE *WRIT*

I. **QUESTION # 1: Where a private company is subject to the Equal Protection Clause of the Constitution because it fulfills a government function, has the employer violated an employee's right to equal protection by facilitating a non-employee's sexual harassment of her in the workplace?**

A claim for sexual harassment may be brought for violations of the equal protection provisions of the United States Constitution, under the Fifth and Fourteenth Amendments, pursuant to 42 U.S.C. § 1983. *Riley v. Buckner*, 2001 U.S. App. LEXIS 240, at 6 (4th Cir. 2002), *citing Beardsley v. Webb*, 30 F.3d 524, 529 (4th Cir. 1994), *citing Davis v. Passman*, 442 U.S. 228, 234-235 (1979); *Bourtos v. Canton regional Transit Auth.* 997 F.2d 198, 202-203 (6th Cir. 1993); *Pontarelli v. Stone*, 930 F.2d. 104, 113-114 (1st Cir. 1991); *Trautvetter v. Quick*, 916 F.2d 1140, 1149 (7th Cir. 1990); *Starrett v. Wadley*, 876 F.2d (10th Cir. 1989); *Bohen v. City of East Chicago*, Indiana, 799 F.2d 1180 (1986). Equal protection prohibits discrimination on the basis of sex, which includes sexual harassment. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986). In assessing a claim of sexual harassment under the equal protection clause, the courts have adopted the same standards applied under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.* (*Id.*) Although this Court has not previously considered a case of employer liability for sexual harassment of an employee by a non-employee in the workplace, all circuits considering this issue have adopted 29 C.F.R. Section 1604.11(e), promulgated by the United States Equal Employment Opportunity Commission (EEOC), which states that an employer may be held liable for the workplace sexual

harassment by non-employees where the employer knows or should have known of the conduct and fails to take immediate and appropriate action. Security USA, Inc., by and through its agents, particularly Claggett, deprived Dominique Gantt of her right to equal protection of the law, on the basis of sex, by allowing/facilitating Sheppard's sexual harassment in her workplace.

All federal courts that have considered this issue have adopted the reasoning in 29 C.F.R. Section 1604.11(e). *See Murrary v. New York University*, 57 F.3d 243 (2d Cir. 1995) (student intern allegedly harassed by patient at dental clinic); *Waltman v. International Paper Co.*, 875 F. 2d 468, 471 (5th Cir. 1989) (employee harassed by independent contractor of employer while on a travel assignment) and *Dornbecker v. Malibu Grand Prix*, 828 F. 2d 307, 309 (5th Cir. 1987) (employee harassed by consultant and employer took swift corrective action); *Christ v. Focus Homes*, 122 F.3d 1107 (8th Cir. 1997) (employees harassed by mentally incapacitated residents); *Little v. Windermer Relocation, Inc.*, 301 F.3d 968 (9th Cir. 2001) (corporate service manager was terminated after reporting that she was raped by a customer during a business dinner); *Folkerson v. Circus Enterprises, Inc.*, 107 F.3d 754 (9th Cir. 1997) (employee of circus harassed by patron while performing pantomime act); *Turnbull v. Topeka State Hospital*, 255 F.3d 1238 (10th Cir. 2001) (psychiatrist harassed by patient); *Lockard v. Pizza Hut*, 162 F.3d 1062 (10th Cir. 1998) (waitress harassed by customer); *Adler v. Wal-Mart Stores*, 144 F.3d 664 (10th Cir. 1998) (employer liability for co-worker harassment is analyzed using the same standard as is harassment by a non-employee); *McGuire v. Virginia*, 988 F. Supp. 980

(W.D. Va. 1997) (executive secretary sexually harassed at worksite by son of Chairman of Board); *Mullis v. Mechanics and Farmers Bank*, 994 F. Supp. 680 (M.D. N. C. 1997) (loan secretary sexually harassed by bank Vice President at work site to which she was temporarily detailed by another employer); *Martin v. Howard University*, 1999 U.S. Dist. LEXIS 19516; 81 FEP Cases 964 (BNA), 15 IER Cases 1587 (D.D.C. 1999) (law professor stalked by a homeless man who targeted African-American female professors around the country, in search of a fictitious "wife"); *Ligenza v. Genesis Health Ventures of Massachusetts, Inc.*, 995 F. Supp. 226 (D. Mass. 1998) (respiratory therapist harassed by patient at employer's health clinic); *Jarman v. City of Northlake*, 950 F. Supp. 1375 (N.D. Ill. 1997) (deputy clerk sexually harassed by elected official); *Kudatsky v. The Galbreath Co.*, 1997 U.S. Dist. LEXIS 14445 (S.D. New York 1997) (real estate sales person sexually harassed by client); *Mart v. Dr. Pepper Co., et al.*, 923 F. Supp. 1380 (D. Kan. 1996) (account sales manager sexually harassed by client); *Hallberg v. Eat "n Park*, 1996 U.S. Dist. LEXIS 3573; 70 Fair Empl. Prac. Cas. (BNA) 361 (waitress sexually harassed by custom); *Otis v. Wyse, et al.*, 1994 U.S. Dist. LEXIS 15172 (D. Kan. 1994) (nurse trainer harassed by independent medical provider); *Hernandez v. Miranda*, et_al., 1994 U.S. Dist. LEXIS 10598 (D. P. R. 1994) (office manager harassed by a customer); *Powell v. Los Vegas Hilton, Corp.*, 841 F. Supp. 1024, 1029 (D. Ct. Nev. 1992) (casino liable for sexual harassment of employee by customers); *Churchman v. Pinkerton*, 756 F. Supp. 515, 518-519 (D. Ct. Kan. 1991) (female security officer harassed by employer's client); EEOC Decision 84-3, 1984 (waitress subject to unwelcome sexual conduct by customer).

II. QUESTION # 2: Does a private security company, providing officers to the federal government to perform the government function of law enforcement on federal property, owe to the public the same equal protection protections owed to the public by the federal government, under the Fourteenth Amendment of the United States Constitution?

The Fourth Circuit dismissed Gantt's claims under the Fifth and Fourteenth Amendments of the Constitution. The Court based its dismissal on its mistaken conclusion that Gantt raised only a Fifth Amendment equal protection claim at the district court level and first raised her Fourteenth Amendment equal protection claim on appeal.

A. ***The Fourth Circuit Erred by Failing to Consider Gantt's Fourteenth Amendment/§1983 Claims***

42 U.S.C. § 1983, promulgated pursuant to the Fourteenth Amendment, applies where there is both a Constitutional right to be protected and the violator has acted "under color of state law," applying a "public function test" to determine whether security officers are acting "under color of state law." *Terry v. Adams*, 345 U.S. 461, 97 L. Ed. 1152, 73 S. Ct. 809 (1953); *Marsh v. Alabama*, 326 U.S. 501, 90 L. Ed. 265, 66 S. Ct. 276 (1946); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 350-51, 42 L. Ed. 2d 477, 95 S. Ct. 449 (1974); *Lee v. Katz*, 276 F.3d 550 (9th Cir. 2002); *Payton v. Rush Presbyterian St. Luke's Medical Center*, 184 F.3d 623 (7th Cir. 1999). Security USA performed both federal and state functions and was therefore subject to the Equal Protection Clauses of both the Fifth and Fourteenth Amendments. Security USA, Inc.

performed the "public," or government, function of policing, on behalf of, and in cooperation with, the federal and state governments. Security, USA performed duties that would have been performed by FPS (United States Federal Protective Service) officers and local police department in the state of Maryland, but for the GSA contract with Security USA to perform these duties.

Contrary to Security USA's assertion and the Fourth Circuit's acceptance of this assertion, Gantt *did* raise her sexual harassment/hostile work environment equal protection claims, both under the Fifth and Fourteenth Amendments, at the district court level. The District Court pleadings reflect a merger of the equal protection arguments under the Fifth and Fourteenth Amendment/ § 1983, just as the federal police and local police merged at the scene(s) of the crimes and tortuous acts committed against Gantt. The District Court held that Gantt could not prevail on a constitutional claim of sexual harassment *"under any theory."* *"Any theory"* included the state "government function" theory of § 1983 in *Rendell v. Kohn*, 457 U.S. at 842-43, specifically cited by the Court.[1] The District Court made no distinction between state and federal government functions allegedly performed by Security, USA. Since law enforcement is both a federal and state

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[1] The district court record contains additional references to, and arguments in support of, Gantt's Fourteenth Amendment/§1983 claims; however, these filings were not included in the *Joint Appendix*, filed with Gantt's Appellate brief. Gantt's counsel never anticipated that Appellee would falsely claim that the constitutional/§1983 claims were not raised at the District Court level. Gantt is prohibited, by this Court's July 3, 2003 Order, from citing them.

function, any distinction is blurred. The Fifth Amendment is invoked because Security, USA performed the public function of federal law enforcement on federal property, the IRS Building. The Fourteenth Amendment and thus, § 1983, are invoked because local law enforcement, the Prince George's County Police Department shared responsibilities on the federal property located in Prince George's County.

In 1999, when Gantt filed her *First Amended Complaint*, she did not have the benefit of discovery and did not know the specific relationship between the federal government, the State of Maryland and Security USA. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) had been the controlling "law of the land" for thirty years. *Bivens* held that agents of the federal government, who had acted "under color of law," could be held personally liable for using their *federal* authority to violate the equal protection rights of members of the public. Gantt reasonably relied on the long-standing *Bivens* precedent for her equal protection claim when she filed her Complaint in 1999. *Bivens* was still the controlling Supreme Court law when the district court dismissed Gantt's claim in January of 2001. The district court did not rely on *Correctional Services v. Malesko*, 534 U.S. 61, which had not yet been decided. *Malesko* was decided nearly two years after this case was filed and months *after* the district court's January 8, 2001 dismissal of Gantt's *Bivens* claim. Instead, the District Court erroneously concluded that Security, USA did not perform a government (federal or state) function at all. Security USA, Inc. actually never moved to dismiss Gantt's equal protection claims in its *Motion to Dismiss Gantt's Complaint.* Security USA only argued

that Gantt did not exhaust her administrative remedies under Title VII.[2] There was never any opportunity to move to amend the complaint to conform to the evidence regarding Security USA's relationship to state law enforcement.[3]

If Gantt had filed a motion to amend the Complaint to conform to the evidence produced during discovery, or, proceeding to trial on the claim of intentional infliction of emotional distress, moved to amend the complaint to conform to the evidence produced at trial, the District Court would not have allowed Gantt to amend the Complaint for the Court to consider whether Security, USA performed a *state*

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[2] Gantt did not file a charge with the Equal Employment Opportunity Commission (EEOC) because her previous attorney advised her that she could not file a claim based on sex discrimination. Gantt was also so advised by the United States Department of Labor. Apparently, Gantt's early advisors were not familiar with 29 C.F.R. 1604.11(e), or cases holding employers liable for the sexual harassment of employees by non-employees in the workplace.

[3] At the Fourth Circuit, Gantt respectfully requested that, if the Court determined that Gantt's § 1983 claim was not addressed at the District Court level, that Gantt be permitted to amend to Complaint to conform to the evidence produced in discovery and/or at trial and restore her § 1983 claim. The § 1983 claim turns substantially on facts that involve the factual working relationship between FPS, Security, USA, and the Prince George's County police department and the authority of each of these law enforcement agencies. In the alternative, Gantt requested that the issue be remanded for an evidentiary hearing in order to assess the relationship between Security, USA, federal police and Prince George's County police, as cooperating law enforcement entities, to determine whether Security, USA performed a government function. No discovery at all was conducted on this issue, since it was dismissed prior to discovery.

government function, since the Court has already determined that Gantt could not prevail on "any theory" that Security, USA performed a government function. Not only would such a motion to amend the complaint be futile, but it could be deemed frivolous, subjecting Gantt to possible sanctions. Security, USA would certainly have argued that Gantt was precluded from reinstating her Fourteenth Amendment/§ 1983 claim because the Court had already considered and dismissed her §1983 claim. Security, USA should not now be permitted to argue that Gantt's Fourteenth Amendment/§1983 claims were never considered by the District Court.

The Fourth Circuit appears to have misunderstood the timing of the district court's dismissal of the claim and this Court's issuance of *Malesko*. *Malesko* is distinguished from *Gantt* in several respects. In *Malesko*, 534 U.S. at 72, this Court declined to afford prisoners in facilities operated by private, corporate government contractors more rights than were afforded prisoners in federal prisons. *Malesko* declined to create a new right of action to allow inmates to sue private contractors acting as government agents in the Correctional system. Gantt does not ask this Court to create a new right of action. Employees of government actors are already entitled to sue their employers for sexual harassment under the equal protection clause of the Constitution. Gantt only asks that this Court acknowledge that Security, USA is a government actor, allowing her to sue, as can a government employee, under the Equal Protection Clause of the Fourteenth Amendment. *Gantt* provides a Court that was sharply divided (five-four) in *Malesko* an opportunity to consider the liability of a private

corporation fulfilling a government function in a context other than prisons, where no new right of action is created, under the Fourteenth Amendment instead of the Eighth, and in the context of a post 9-11 society that is widely delegating the government function of law enforcement, and even national security, to private corporations. In these contexts, the Constitutional rights of the citizens of our country need to be re-examined. Even if Gantt had not specified that her equal protection claims were brought under the Fourteenth Amendment as well as the Fifth, the filings that were made part of the record on appeal constituted sufficient "notice" that Gantt was alleging violations of the Fourteenth Amendment.

B. ***The Fourth Circuit Erred, as a Matter of Law and Fact, by Concluding that Security USA was not a State Actor***

The Fourth Circuit did not provide any analysis of the facts to determine whether Security, USA performed a state function; however, Security USA satisfied the "public function" test. Security USA, Inc. officers performed duties that would otherwise be performed by FPS officers and/or local police officers within the State of Maryland. In fact, to be an armed federal officer stationed in Maryland, a security officer had to be issued a handgun permit by the State of Maryland. The IRS, by contracting with Security USA, Inc. to protect persons and property at the IRS Building, delegated its duty to provide security in the building to Security USA, Inc. The state of Maryland had already partially deferred its duty to the federal government on federal property located in the state of Maryland. GSA (the United States General Services Administration) guards perform functions of *law*

enforcement, which is traditionally a government function.

In *Katz*, a plaintiff was able to maintain a claim under 42 U.S.C. § 1983 against a private corporation, as a "state actor," where the corporation leased public property that remained open to the public and employed security officers to "police" the property. This policing included the regulation of speech, and, plaintiffs alleged, infringed upon their First Amendment rights. Since the security officers performed the "public function" of enforcing the laws and regulations of the city, they were state actors and their employer could be held liable for their actions under 42 U.S.C. § 1983. The Court in *Payton*, 184 F.3d at 628-630, concluded that, if the state cloaks private individuals with virtually the same power as public police officers, and the private actors allegedly abuse that power to violate a plaintiff's civil rights, that plaintiff's ability to claim relief under § 1983 should be unaffected. *See also United States v. Hoffman*, 498 F.2d 879, 881-82 (7th Cir. 1974) (privately employed railroad police deemed state actors) *Scott v. Northwestern University School of Law*, 1999 U.S. Dist. LEXIS 2815, 1999 WL 134059 at *3-4 (N.D. Ill. March 8, 1999) (private university police officer held to be state actors); *Stokes v. Northwestern Memorial Hospital*, 1989 U.S. Dist. LEXIS 8543, 1989 WL 84584 at *3-4. (N.D. Ill. July 20, 1989) (private hospital security guards held to be state actors); *United States v. Belcher*, 448 F.2d 494, 497 (7th Cir. 1971) (railroad officers defined as state actors); *Henderson v. Fisher*, 631 F.2d 1115, 1117-18 (3rd Cir. 1980) (campus security officers were state actors); *Scott v. Northwestern University School of Law*, 1999 U.S. Dist. LEXIS 2815,

1999 WL 134059at *3-4 (N.D. Ill. March 8, 1999) (university police officers acted within of color of state law where they enforced state statutes).

A GSA officer cannot be viewed in the same way as a minimum wage "night watchman" or "rent a cop" for an amusement park or nightclub hiring private security to protect its private property.[4] GSA guards are extensively regulated, supervised and certified by federal police officers, or "FPS" officers, pursuant to the authority of the General Services Administration to enforce federal, state and local law on federal property. *Myers Investigative and Security Services, Inc.*, 275 F.3d 1366, 1368 (Fed. Cir. 2002) (GSA is responsible for providing guard services for federal civilian facilities and may contract with private security firms to do so); *Myers Investigative and Security Services, Inc.*, 47 Fed. Cl. 605, 607 (Ct. Cl. 2000) (GSA supplies armed and/or unarmed guards for federally owned and/or leased properties); *Seattle Sec. Services, Inc. v. United States*, 45 Fed. Cl. 560, 572 (Fed. Cl. 2000) (when determining whether contract with security company should be cancelled, in favor of another, Court must consider **the "danger to the public"** and the **"public interest,"** weighing against interruption of a security company's GSA contract for guards in federal building); *Johnson and Gordon Security, Inc. v. GSA*, 857 F.2d 1435, 1436 (Fed. Cir. 1988) (GSA guards stationed in federal buildings in the State of Maryland **are required**

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[4] For purposes of obtaining additional contracts with the United States government to protect government bui lings, government employees and member of the public, surely, Security, USA (now operating under a different name, under its President, Tim Weldon), would not describe its own officers as protecting only private interests and private property.

to be licensed private detectives, pursuant to Maryland law in order to carry handguns, in addition to meeting GSA requirements); *U.S. v. Burton*, 888 F.2d 682, 684, 685, 682 (10th Cir. 1989) (guards in federal buildings, controlled by GSA, are recognized as having the powers of **special police officers, which includes arrest powers under state law**); *Roy v. U.S.*, 527 A.2d 742, 744 (D.C. App. 1987) (contract guard initially responded to complaint of assault on federal property, rather than calling FPS or local police); *U.S. v. Ramsey*, 871 F.2d 1365, 1366 (8th Cir. 1989) (GSA contract guard was not distinguished from FPS officer, where perpetrator was charged with forcibly disrupting the duties of a federal employee and guard subdued protester with a nightstick on federal property); *Transco Security, Inc. v, Freeman*, 639 F.2d 318, 322 (6th Cir. 1981) (federal contract guards perform "services that are essential to the daily operation of important government facilities"); *Jarecki v. U.S.*, 590 F.2d 670 (7th Cir. 1979), *cert. denied*, 444 U.S. 829; *Hoehn v. International Security Services and Investigations, Inc.* 244 F. Supp. 2d 159, 173 (W.D.N.Y. 2002) (all GSA contract guards must meet the physical and other requirements established by GSA); *U.S. v. Brasch*, 1996 WL 720090 (S.D.N.Y. 1996) (contract GSA certified security guards are authorized to enforce federal law and regulations in government buildings); *City of Wisconsin v. Hough*, 142 Wis.2d 941, 419 N.W. 360 (Wis. App. 1987) (acting under the authority of FPS, a contract security guard was authorized to **uphold state and local ordinances** and maintain the peace in a federal building); *James v. Golden*, 1986 WL 155522, at *1, 3 (D.D.C. 1986) (GSA may revoke the guard's certification, or "GSA card" for failure to meet those requirements, barring him/her from working at

any federal building as a guard); *Middleton v. United States*, 305 A.2d 259, 261 (D.C. App. 1973) (all authority exercised by FPS is derived from GSA); *Whelan Security Co., Inc., v. United States*, 7 Cl. Ct. 496 (Ct. Cl. 1985) (GSA had authority to regulate duties of contract guards and to investigate and fine security company for failure to pay contract guards in accordance with Department of Labor standards).

The federal government transferred the responsibility to certify, train and supervise GSA guards from FPS to the United States Department of "Homeland Security," pursuant to the Homeland Security Act of 2002, § 1315, Pub.L. 107-296, Nov. 25, 2002, 116 Stat. 2135; *see also*, 6 U.S.C.A. § 542; 40 USCA § 318; www.gsa.gov/federalprotectiveservice. This transfer highlights the special responsibility of GSA contract guards to protect the public, public property and to fulfill a "public" or "government" function, rather than simply serve private interests. Defendant admitted, on at 5 of its Fourth Circuit Brief, that Gantt alleged, in her *First Amended Complaint* ¶ 48, that due to Sgt. Claggett's actions, Gantt was deprived of the opportunity for police protection from local police. Absent Security, USA's performance of the government function of law enforcement, Gantt would have been protected by local police. Security, USA's usurpation of that function deprived her of that protection. The security officers who witnessed Sheppard's attack upon Gantt did have a duty to rescue Gantt. Unfortunately, they were ill-equipped to do so at the time. Although the guards were supposed to be

armed, they had not yet been issued their weapons.[5] These unarmed officers were not inclined to attack the shot-gun wielding Sheppard bare-handed. It was therefore appropriate to call the Prince George's County police to apprehend Sheppard and rescue Gantt; yet Claggett prevented her subordinate Security, USA officers from making that call.

III. QUESTION # 3: Does tort law require that the tortfeasor intend the precise injuries suffered in order to be held liable for the injuries inflicted by the tortuous conduct?

A. *The Fourth Circuit's Opinion is Internally Inconsistent*

The Fourth Circuit correctly concluded, in Section III. A. of its opinion (App. 9a-14a), that Claggett specifically intended to cause Gantt emotional distress and that she intended to force her to "talk" to, or confront Gary Sheppard. Judge Motz, joined by Judge Luttig (Judge Niemeyer dissenting), therefore determined that Security USA could be held liable for the emotional distress that stress that Claggett caused Gantt for the hour that Gantt was assigned to Post 9 before Sheppard arrived; however, Judge Motz declined to apply the same reasoning to the emotional distress that Gantt experienced once she was assaulted, kidnapped, raped and otherwise abused by Sheppard once actually he arrived on Post 9. Judge Motz opined that, in order to meet the elements of an intentional

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[5] Whether the officers should have been armed by that time involves questions of negligence, barred by the Maryland Workers' Compensation Act. Similarly, there are questions as to why security officers in the control room, with Claggett, did not see the abduction on the television monitors provided for alerting officers to crimes in progress. It is also not clear why the officer who witnessed the abduction was not equipped to radio for assistance.

infliction of emotional distress claim, Claggett would have specifically intended that Sheppard assault Gantt, kidnap her, rape her and hold her prisoner and threaten to kill her; however, tort law has never required such specific intent to harm. Judge Motz' decision is internally inconsistent, as is demonstrated by the partial concurrences and dissents of Judges Luttig and Niemeyer. The opinion artificially separates events that are part of the same continuum, set in motion by Claggett. The same rationale that applies to Judge Motz' conclusion that Claggett intended to cause Gantt emotional distress while she was stationed at Post 9 should be consistently applied to conclude that Claggett intended to cause Gantt emotional distress by forcing her to confront Gary Sheppard and by withholding police intervention from her while Gary Sheppard was assaulting and kidnapping her.

B. *The Elements of an Intentional Infliction of Emotional Distress Claim*

The long established case law in Maryland adopted the same elements for to establish a claim of intentional infliction of emotional distress adopted by most states and the *Restatement* (Second) of Torts. The conduct (1) must be intentional or reckless; (2) must be extreme and outrageous; (3) must be causally related to the emotional distress; (4) and must result in severe emotional. District Court's December 4, 2002 Opinion, App. 9a-10a, citing, *inter alia, Manikhi v. Mass Transit Admin.*, 758 A.2d 95, 113 (Md. 2000), *Foor v. Juvenile Services Admin.*, 552 A.2d 947 (Md. Ct. Spec. App. 1989) and *Harris v. Jones*, 380 A.2d 611 (Md. 1977). *Foor* added that, in order to meet the first element, a plaintiff must offer evidence that the defendant either *desired* to inflict severe emotional distress, knew that

such distress was certain or substantially certain to result from his conduct, or acted recklessly in deliberate disregard of *a high degree of probability* that the emotional distress would follow.

Tort law has long recognized that where a person commits a wrongful act against another, knowing that it will cause or is likely to cause harm, the wrongdoer is liable even if the resulting injuries are more extensive than expected. *Lambertson v. United States*, 528 F.2d 441 (2d Cir. 1976); *Green v. The Wills Group, Inc.*, 161 F. Supp. 2d 618, 623 (D. Md. 2001); *Christian v. Minnesota Min, & Mfg. Co.* 126 F. Supp. 2d 951 (D. Md. 2001); *Brackett v. Peters*, 11 F.3d 78, 81 (7th Cir. 1993), *cert den.* 1994 U.S. LEXIS 3385; *Lancaster v. Norfolk & Western Ry.*, 773 F.2d 807, 822 (7th Cir. 1985); *Steinhauser v. Hertz Corp.*, 421 F.2d 1169, 1172-73 (2d Cir. 1970); *Gantt v. Security USA*, District Court's December 4, 2002 *Memorandum Opinion*, at 10-11, App. 44a-45a; *Ruple v. Brooks*, 352 N.W.2d 652 (S.D. 1984); *Garrett v. Daily*, 279 P.2d 1091 (Wash. 1955); *Vosberg v. Putney*, 50 N.W. 403 (Wis. 1891), *Restatement of Torts (Second)* §461. This doctrine is commonly known as the "eggshell skull" theory.

Maryland law is completely consistent with this textbook analysis of intentional torts and their resulting injuries. *Saba v. Darling*, 575 A.2d 1240 (Md. 1990) (defendant who intentionally punched plaintiff, but did not intend to break his jaw had committed a battery because he intended some type of harm when he punched him); *Saadeh* v. *Saadeh*, 150 Md. App. 305 (Md. Ct. Spec. App. 2003), cited by the Fourth Circuit in *Gantt*. App. 14a. There is no basis for reading into

Maryland Workers' Compensation law a "special," more restrictive standard by which intentional torts against employers are analyzed than are intentional tort cases against non-employers. The Maryland Workers' Compensation Act did not intend to change the elements of common law torts.

C. ***Gantt's Claims are not Excluded by the Maryland Workers' Compensation Act***

The Maryland Workers' Compensation Act (WCA), Section 9-509(d), bars employees from suing their employers for negligence, but employees may sue their employers for the intentional torts of its agents. As the Fourth Circuit majority correctly stated, Section 9-509(d), was applied in the controlling case of *Federated Stores v. Le*, 324 Md. 71, 80 (1991),. App. 12a-13a. In *Le*, the plaintiff was permitted to sue his employer for intentional infliction of emotional distress when another employee accused him of stealing and coerced him into signing a confession. In contrast, *Johnson v. Mountaine Farms of Delmarva, Inc.*, 305 Md. 246 (Md. 1986), Defendant failed to repair a gas tank, in violation of safety regulations and an employee was killed when it exploded. Although grossly and callously negligent, there was no evidence that the Defendant intended to harm the worker. To the contrary, the Defendant hoped that the tank would not explode and destroy his property of injure his customers or employees. The defendant was motivated by greed and took the "risk," of not repairing the tank. *Johnson* did not re-define an intentional tort as only one where the wrongdoer intends the *specific injury actually inflicted. Harris v. Jones*, 281 Md. 560 (Md. 1977) continues to be cited as the Maryland precedent for establishing the criteria for a case of intentional infliction of emotional distress in

was also an employment cases, long after *Johnson.*. *Green v. The Wills Group, Inc.*, 161 F. Supp. 2d 618, 623 (D. Md. 2001), 161 F. Supp. 2d 618, 623 (D. Md. 2001).

D. *Claggett's Conduct Constitutes Intentional Infliction of Emotional Distress*

In sharp contrast to *Johnson*, Claggett's acts did not constitute negligence. Claggett intended to force an interaction between Sheppard and Gantt against Gantt's will, knowing full well that Sheppard was threatening Gantt's life and had previously assaulted her. Claggett knew that, in order for Sheppard and Gantt to "talk," as suggested by Claggett, Sheppard would have to first violate a Court Order, and then exert physical force over Gantt to restrain her. Any such physical force would have constituted assault, battery, false imprisonment and intentional infliction of emotional distress. Claggett's intentional, affirmative and deliberate order that Dominique Gantt assume Post 9, instead of an inside post, served no purpose other than to provide Gary Sheppard access to her. Claggett knew that whatever happened during this encounter, Sheppard would inflict severe emotional distress upon Gantt – with or without an actual physical attack. Claggett admitted that, at the time of the kidnap, she was afraid that Sheppard would kill Gantt, himself, or be killed or arrested. Apparently, Claggett was more "scared" that Gary Sheppard would go to jail than she was that Sheppard would kill Gantt or otherwise continue to assault and terrorize her. Claggett aided and abetted Sheppard's "getaway," and consequently, his imprisonment of, and assaults upon Dominique Gantt.

There is no reasonable "innocent" explanation for Claggett's actins. Claggett could not possibly have intended to be a "peacemaker," as Judge Niemeyer concluded. App. 29a. Claggett could not have intended "peace" by violating a Court Order and facilitating access to one of her employees on her post to a man who was threatening to kill her. Claggett could not facilitate "peace" by assisting that man in his escape of police, while he is kidnapping, at gunpoint, the very employee that he has threatened to kill. Claggett could not have possibly believed that Sheppard was not "hurting Dominique Gantt" while he was dragging her into his van, in a chokehold, with a shotgun pressed against her chin.

IV. QUESTION # 4: May a person who intentionally assists a tortfeasor in gaining access to his victim, in violation of a Court's Restraining Order and knowing that the tortfeasor has assaulted and threatened to kill the victim, be held liable for the emotional distress suffered by the victim who is kidnapped, raped, battered and otherwise tortured by the primary tortfeasor, under the theory of aiding and abetting tortuous conduct?

A. ***State and Federal Courts have Adopted the Aiding and Abetting Doctrine***

The *Halberstam* court, 705 F.2d 472, 483 (D.C. Cir. 1983) summarized the elements of aiding and abetting tortuous conduct as follows: 1) the party whom the Security USA, Inc. aids must perform a wrongful act that causes an injury; 2) the defendant must be generally aware of his role as part of an overall illegal or tortuous activity at the time that he provides the

assistance; 3) the defendant must knowingly and substantially assist the principal violation .... Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortuous, it has the same effect upon liability of the advisor as direct participation. In *Halberstam*, the defendant was held civilly liable for wrongful death for a murder resulting from a burglary, both under theories of civil conspiracy and aiding and abetting tortuous conduct. The defendant did not personally commit the murder or the burglary. She was not even present and had no specific knowledge that the murder or burglary would take place; however, since the defendant managed money for the burglar, her boyfriend, and should have realized that he was burglarizing homes, she aided and abetted him. 705 F.2d at 842, *quoting American Family Mut. Ins. Co. v. Grim*, 440 P.2d 621, 626 (Kan. 1968).

The Fourth Circuit adopted the reasoning in *Halberstam* for analyzing the tort of civil conspiracy. *McNabb v. North Carolina*, 2001 U.S. Dist. LEXIS 13182 at 40-41 (4th Cir. 2001); *Rice v. Paladin Enterprises, Inc.*, 128 F.3d 233 (4th Cir. 1997) (publisher held liable for wrongful death for publishing "hit man" manual). *Halberstam* has also been adopted by other circuits, not only for setting forth the elements of civil conspiracy, but also for ascertaining the elements necessary for tort liability for aiding and abetting tortuous conduct. *Browning v. Clinton*, 292 F.3d 235, 245 (D.C. Cir. 2002); *Temporamandibular Joint Implant Recipients v. Dow Chemical Co.*, 113 F.3d 1484, 1496 (8th Cir. 2001); *Easter Trading Co. v. Refco, Inc.*, 229 F.3d 617, 623 (7th Cir. 2000); *Aetna Cas. and Sur. v. Leahy Constr.*, 219 F.3d (6th Cir. 538 (6th Cir.

2000); *Cox v. Administrator U.S. Steel and Carnegie*, 17 F.3d 1386, 1410 (11th Cir. 1994), *modified on other grounds*, 30 F.3d 1347 (11th Cir. 1994), *cert. denied*, 513 U.S. 1110. Maryland has explicitly recognized liability for persons who aid and abet others in their tortuous conduct. *Alleco Inc. v. Harry and Jeannette Weinberg Found.*, 340 Md. 176, 200-201 (Md. App. 1995).

C. *Claggett Aided and Abetted Sheppard, Causing Gantt Severe Emotional Distress*

Judges Motz and Luttig recognized the doctrine of aiding and abetting tortuous conduct, citing *Saadeh v. Saadeh*, 819 A.2d 1158, 1171 (Md. Ct. Spec. App. 2003) (App. 13a-14a); yet, Judge's Motz' opinion, joined at this stage only by Judge Niemeyer (Judge Luttig dissenting), did not apply the aiding and abetting doctrine to emotional distress stemming from Sheppard's abduction and rape of Gantt. It is not necessary that Claggett intended that Sheppard kidnap and rape Dominique Gantt, in order for Security USA to be held liable for the tortuous conduct committed by Sheppard. The defendant in *Halberstam* had no animosity toward the man that her boyfriend robbed and killed. She did not even know him. She was motivated by her own material desires, since she enjoyed the "fruits" of her boyfriend's robberies. Claggett was generally aware that her acts would substantially assist Sheppard in gaining access to Gantt, with or without the assault, batteries (including rape) and false imprisonment. Claggett intended to injure Gantt by forcing her to confront Sheppard, against her will, in violation of a Protective Order specifically issued to protect Gantt from physical harm by Sheppard. Sheppard's acts do not relieve Claggett or

Security USA of responsibility for the egregious harm that Dominique Gantt suffered at the hands of Gary Sheppard. Sheppard's acts were not superceding, intervening causes of Gantt's injuries any more than a speeding train would be a superceding intervening cause of her death if Claggett had tied her to the tracks in its path.

CONCLUSION

Gantt respectfully requests that this honorable Court grant Petitioner *certiorari.*

Respectfully submitted,

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(Any footnotes trail the end of each document)

No. 03-1033

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DOMINIQUE K. GANTT,
Plaintiff-Appellant,

v.

SECURITY, USA, INCORPORATED,
Corporate Office,
Defendant-Appellee,

and

VSI, INCORPORATED, formerly known as Security, USA, Incorporated, its agents, employees and representatives; TIM WELDON, President; ANGELIA CLAGGETT, Shift Supervisor; GARY SHEPPARD, Inmate # 266463; EARL WOOD, Project Manager and Resident Agent,
Defendants.

September 26, 2003, Argued
January 23, 2004, Decided

COUNSEL: ARGUED: Dawn Valore Martin, LAW OFFICES OF DAWN V. MARTIN, Washington, D.C., for Appellant.

Michael Sumner Levin, DIRSKA & LEVIN, Columbia, Maryland, for Appellee.

ON BRIEF: F. Nash Bilisoly, Arlene F. Klinedinst, Christopher Ambrosio, VANDEVENTER BLACK, L.L.P., Norfolk, Virginia, for Appellee.

JUDGES: Before NIEMEYER, LUTTIG, and MOTZ, Circuit Judges. Judge Motz wrote the opinion, in which Judge Niemeyer and Judge Luttig concurred in part and dissented in part. Judge Niemeyer wrote an opinion concurring in Part II and dissenting from Part III and dissenting from the judgment. Judge Luttig wrote an opinion concurring in Part II and a portion of Part III, and dissenting from a portion of Part III and from part of the judgment.

OPINIONBY: DIANA GRIBBON MOTZ

OPINION: DIANA GRIBBON MOTZ, Circuit Judge:

Dominique Gantt informed her employer, a private security company, that she had obtained a protective order barring her former boyfriend from any contact with her. But Gantt's supervisor, apparently believing that the estranged couple "should talk," permitted the boyfriend access to Gantt. The boyfriend then, at gunpoint, kidnaped Gantt from her work place and held her captive for six hours, assaulting and raping her. Gantt brings this action against her employer seeking damages for her resulting severe emotional and mental distress; she asserts that her employer violated its Fifth Amendment duty to prevent sexual harassment in the workplace and intentionally inflicted emotional distress upon her. Because no Fifth Amendment claim lies against a private entity, we affirm the district court's dismissal of this claim. However, the district court erred in its analysis of Gantt's emotional distress

claim; accordingly, we must reverse part of its grant of summary judgment to the employer on this ground, and remand for further proceedings.

I.

On November 6, 1996, upon finding that Gary R. Sheppard had caused Gantt serious bodily harm by "repeated acts of violence," a Maryland court granted Gantt a protective order. The protective order barred Sheppard from abusing, threatening, or contacting Gantt anywhere -- including her home or "place of employment" -- and by any means -- in person, on the telephone, or in writing.

The next day, Gantt notified her employer, Security, USA, Inc., of the protective order and even brought a copy of the order to officials at Security USA for their examination. Security USA Project Manager Earl Wood then notified all Security USA supervisors that Gantt should only be assigned to secured inside posts so that Sheppard could not gain access to her at work.

Sheppard, who worked as a security officer at another private security company, Wackenhut Services, was "weapon qualified"; that is, he was trained and qualified to use a gun. At Wackenhut, Sheppard worked during the week with Sgt. Angela Claggett, who supervised Gantt at Security USA on weekends. Sgt. Claggett acknowledged that she had a "friendly relationship" with Sheppard.

Sgt. Claggett testified that Security USA Manager Wood told her when Gantt obtained a protective order against Sheppard, and that Sgt. Claggett had been

directed to move Gantt to an "inside location at the loading dock." Gantt, herself, also talked with her supervisor, Sgt. Claggett, about the protective order. Sgt. Claggett reported that Gantt told her that Sheppard "hit her [Gantt] and that this hadn't been the first time and she was tired of it and didn't want to go through it anymore." In addition, Sgt. Claggett acknowledged that she knew Sheppard had attempted to break into Gantt's mother's house while Gantt was there. Gantt testified that she told Sgt. Claggett that Sheppard threatened to kill her if she did not "drop the charges . . . from the previous incident at my mother's house."

Other sources confirmed what Gantt had told Sgt. Claggett. Sheppard himself talked with Sgt. Claggett about the protective order and his conduct. He acknowledged that he had "put [his] hands" on Gantt but claimed that he "loved her." According to Sgt. Claggett, she told Sheppard that he "shouldn't have done that" but that "it's understandable" and "you all need to talk." Sgt. Claggett also testified that she had heard that Sheppard threatened to "kill himself, his children, his wife and Ms. Gantt."

Despite Sgt. Claggett's admitted knowledge of Sheppard's abuse of Gantt and threats to kill her, in November (after issuance of the protective order) when Sheppard telephoned Gantt at work, Sgt. Claggett took the call and urged Gantt to talk to Sheppard. Gantt refused, saying "he's not supposed to be calling me at my job. " Sgt. Claggett responded, "just talk to him" and transferred the call immediately to Gantt. After telling Sheppard "please don't call again . . . I'll notify the court" and hanging up on him, a distressed Gantt

reported Sgt. Claggett's conduct to Project Manager Wood. Nonetheless, Sgt. Claggett later in November transferred still another call from Sheppard to Gantt, saying "all he wants to do is talk to you."

On the first Saturday of the next month, December 7, 1996, at 6:00 A.M., Gantt reported to work for Security USA at the Internal Revenue Service building in Lanham, Maryland. Sgt. Claggett was the "senior person in charge"; no one else at the site was "above Ms. Claggett." Sgt. Willie Jones, concluding his shift and being replaced as the supervisor by Sgt. Claggett, reminded Claggett that "we got to leave Dominique [Gantt] inside." Yet after Sgt. Jones left, Sgt. Claggett ordered Gantt to assume unsecured Post # 9 outside the building. Gantt tried to refuse, reminding Sgt. Claggett "you know this stuff is still going on and . . . I am supposed to be inside." Sgt. Claggett ordered Gantt "to go right to" Post # 9 and "just got louder and louder" as she did so. Finally, Gantt obeyed Claggett and went outside to unsecured Post # 9.

Within fifteen minutes of Gantt assuming her assignment at Post # 9, Sheppard telephoned her at her work station. Gantt testified that the phone's display indicated that Sheppard's call was transferred to her from Sgt. Claggett's inside extension. During the brief telephone call, Sheppard was "really mean" to Gantt and she hung up on him. Distraught, Gantt then telephoned Sgt. Claggett, told her Sheppard had "just called" and that Gantt "wanted to be moved to an inside post." Sgt. Claggett refused to permit Gantt to move inside to safety.

At approximately 7:00 A.M., Sheppard arrived at the IRS building and proceeded to Gantt at Post # 9. Gantt ran from Post # 9 toward an entrance to the IRS building in search of safety. Sheppard pulled a shotgun from his trench coat and with the gun drawn and aimed at Gantt, chased her through the area surrounding Post # 9, shouting "Run! Run!" Sheppard chased Gantt until he caught her, then grabbed her by her arm, and pressing the shotgun against her chin, placed her in a choke hold. Sheppard dragged Gantt along an outside area of the IRS building, off the premises, and into his van.

Two security guards at the IRS building witnessed Sheppard kidnap Gantt. One of these guards, in the presence of Officer Darren Harvey, reported Gantt's abduction at gunpoint to Sgt. Claggett. When it was suggested that the police be called, Harvey testified that Sgt. Claggett said "no, we don't need to call the police because he doesn't want to hurt her, he just wants to talk to her." Someone eventually did call the police. At her deposition, Sgt. Claggett testified that she did so, but acknowledged that she did not call until "five to ten minutes" after the abduction, even though she conceded that she knew that five or ten minutes can mean the difference between life and death when someone is held at gunpoint.

Sheppard held Gantt captive for six hours, driving through Maryland, Delaware, and the District of Columbia to evade police. He raped and physically and verbally terrorized Gantt, threatening to kill her with his shotgun. Gantt repeatedly begged for her life and eventually convinced Sheppard that she would reconcile with him and tell the police she went with him

willingly. Sheppard then hid his shotgun and surrendered to the police.

Sheppard was convicted in state court of kidnaping, first degree rape, and violation of the restraining order. The court sentenced him to twenty years imprisonment.

When Gantt returned to work at Security USA, she told Project Manager Wood and Internal IRS investigative officers she believed that Sgt. Claggett bore responsibility for Sheppard's assault of her. Wood never responded to or acted on this complaint. Instead, Security USA permitted Claggett to maintain her supervisory duties and rank as sergeant and, when on Sgt. Claggett's shift, Gantt had to report to her.

On December 2, 1999, Gantt filed suit in state court against Security USA; the company removed the case to federal court. Gantt alleges that as a result of the events of December 7, 1996, she has suffered physical injury, severe emotional distress, "recurring nightmares and other mental health issues, which have dramatically reduced her quality of life." She contends that she has undergone "medical evaluation and treatment," incurred medical expenses, and lost wages. Although Gantt alleged a number of theories of recovery in her complaint, she only appeals the district court's rejection of her sexual harassment and intentional infliction of emotional distress claims. We consider each in turn.

II.

Gantt contends that the district court erred in dismissing her sexual harassment claim. Specifically, she maintains that Security USA "failed to take reasonable steps to end, and indeed facilitated, the sexual harassment by Sheppard, creating a hostile work environment." Brief of Appellant at 14.

In her complaint, Gantt alleged that in so failing, Security USA violated the Fifth Amendment of the United States Constitution, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (2000), and Article 49B of the Maryland Annotated Code, Md. Code Ann., § 49B (1998). The district court dismissed her statutory claims, reasoning that Gantt failed to exhaust her administrative remedies, a prerequisite for a Title VII claim, and that Article 49B does not create a private cause of action of sexual harassment. Gantt does not appeal those dismissals. Thus, as Gantt recognizes, the only possible basis for her sexual harassment claim is the Constitution. As she also recognizes, in order to state a constitutional claim, she must allege facts, which, if proved, would establish Security USA is a governmental actor.

Gantt has attempted to satisfy this requirement by alleging that Security USA "acted as an agent or instrumentality of the United States government to protect persons and property on the premises of the IRS building" and so had a Fifth Amendment duty to protect her from workplace sexual harassment. n1 In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971), the Supreme Court did recognize an implied private action

for damages against agents of the United States alleged to have violated a citizen's constitutional rights. However, the Court has specifically declined to "extend this limited holding to confer a right of action for damages against private entities acting under color of federal law." Correctional Services Corp. v. Malesko, 534 U.S. 61, 66, 151 L. Ed. 2d 456, 122 S. Ct. 515 (2001) (refusing to allow a Bivens claim against a halfway house operated by private entity under contract with the Bureau of Prisons) (emphasis added). Indisputably, Security USA is a private entity; therefore no Bivens claim lies against the company. For this reason, the district court properly dismissed Gantt's constitutional sexual harassment claim against Security USA.

III.

Gantt's intentional infliction of emotional distress claim presents a more complicated question. Although the district court denied Security USA's motion to dismiss this claim, the court ultimately granted the company summary judgment on the claim. We believe the court erred in doing so.

A.

The district court correctly recognized, that in Maryland (as in many other jurisdictions) a claim of intentional infliction of emotional distress has four elements:

(1) The conduct must be intentional or reckless; (2) the conduct must be extreme and outrageous; (3) there must be a causal connection between the wrongful

conduct and the emotional distress; (4) the emotional distress must be severe.

Manikhi v. Mass Transit Admin., 360 Md. 333, 758 A.2d 95, 113 (Md. 2000) (internal quotation marks and citations omitted).

In its seminal case recognizing intentional infliction of emotional distress as a valid tort in Maryland, the state's highest court relied on Restatement (Second) of Torts § 46, comment i (1965) to explain the first element:

the defendant's conduct is intentional or reckless where he desires to inflict severe emotional distress, and also where he knows that such distress is certain, or substantially certain, to result from his conduct; or where the defendant acts recklessly in deliberate disregard of a high degree of probability that the emotional distress will follow.

Harris v. Jones, 281 Md. 560, 380 A.2d 611, 614 (Md. 1977); accord, B.N. v. K.K., 312 Md. 135, 538 A.2d 1175, 1180 (Md. 1988); see also, Kentucky Fried Chicken Nat'l Mgmt. Co. v. Weathersby, 326 Md. 663, 607 A.2d 8, 17 (Md. 1992) ("We apply the law of intentional infliction of emotional distress as we adopted it nearly 15 years ago in Harris v. Jones."); Foor v. Juvenile Services Admin., 78 Md. App. 151, 552 A.2d 947, 959 (Md. Ct. Spec. App. 1989) (explaining that to meet the first element a plaintiff must offer evidence that "the defendant either desired to inflict severe emotional distress, knew that such distress was certain or substantially certain to result from his conduct, or acted recklessly in deliberate disregard of a high degree of probability that

the emotional distress will follow." (emphasis in original)).

The district court properly stated and applied this standard in concluding that Gantt had satisfied the first element of the tort with respect to one portion of her intentional infliction of emotional distress claim. The court reasoned that Gantt:

has forecasted evidence that Claggett's assignment of Plaintiff [i.e. Gantt] to Post 9 was an intentional act given that Claggett was aware that Sheppard has talked about killing Plaintiff, that Plaintiff was afraid of Sheppard, and that she had obtained a restraining order against him. Looking at the evidence in the light most favorable to the Plaintiff, one could conclude that Claggett intentionally assigned Plaintiff to a post where she knew Plaintiff would be in fear and then refused Plaintiff's requests to leave the post after Sheppard called her there.

This conclusion seems unassailable. However, turning to the third and fourth elements, the court rejected Gantt's intentional infliction of emotional distress claim, concluding that the emotional distress actually caused by Claggett's intentional conduct -- which the court determined to be "the fear she suffered while waiting at the post" -- did not meet "the high burden imposed by the requirement that a plaintiff's emotional distress be severe." (emphasis in original and internal quotation marks and citation omitted). This was error.

The court artificially restricted the emotional distress caused by Claggett's intentional conduct to the fear Gantt experienced while waiting at the post, ignoring

the fact that Gantt has testified that the hour she spent waiting in fear of Sheppard's arrival had a longer-term emotional impact. Gantt has alleged not just that her abduction and rape caused severe emotional distress, but generally that "as a result of the injuries sustained on December 7, 1996," she has been caused "recurring nightmares and other mental health issues which have dramatically reduced her quality of life." Gantt has testified that she has been forced by the events of December 7 (not just the abduction and rape) to seek psychiatric or psychological counseling for anxiety attacks, when she never before had suffered such attacks or sought such counseling. Gantt also testified that she "still" cannot "go too many places by myself" and she "keeps having anxiety attacks," which occur "three, four and five times a week" and frequent nightmares.

Security USA has failed to offer convincing evidence indicating that Claggett's assignment of Gantt to unsecured Post #9 and Claggett's obdurate refusal to remove Gantt even after Sheppard telephoned her there could not have caused a significant portion of the severe emotional distress that Gantt testified she continued to suffer after December 7. Given this record, we cannot hold that the district court properly granted summary judgment on this basis. We note that Maryland's highest court has held that an employee's far less egregious conduct toward another employee caused emotional distress sufficient to preclude summary judgment for the employer. See Federated Dep't Stores, Inc. v. Le, 324 Md. 71, 595 A.2d 1067 (Md. 1991) (holding trial court should not have granted summary judgment to employer when employee offered evidence a company security officer falsely

accused him of stealing a calculator and coerced him into signing a confession, resulting in his loss of his job (not fear for his life like Gantt) and loss of sleep "for weeks" (not still reoccurring nightmares like Gantt)). With respect to the second portion of Gantt's emotional distress claim -- that growing out of the abduction and rape -- the district court did correctly acknowledge what we believe is undeniable: the distress suffered as a result of these acts "would likely meet the high burden of 'severe emotional distress.'" The court held, nevertheless, that the acts did not provide the basis of an intentional infliction of emotional distress claim because they were "caused by Sheppard, not by Claggett" and no evidence suggested that Claggett "intended for Plaintiff to suffer, or even recklessly disregarded the possibility of, the severe emotional trauma of being abducted, threatened and raped." (emphasis in original). The court concluded that "once again, therefore, the causal link between wrongful intentional conduct and severe emotional distress required by the third prong is absent."

There are several problems with this analysis. First, the district court seems to have concluded that the presence of an intervening actor, Sheppard, necessarily severs any causal connection between Claggett's intentional conduct and the severe emotional distress suffered by Gantt during the abduction. Second, given Claggett's knowledge about Sheppard's past behavior and threats of violence, the court too easily dismissed the argument that Claggett recklessly disregarded a high degree of probability that assigning Gantt to Post # 9 would result in her suffering violence at the hands of Sheppard. Finally, the court completely ignored Gantt's evidence that Claggett aided and abetted Sheppard, a

tort that would require Claggett to only "have engaged in assistive conduct that she would know would contribute to the happening of that act."

Saadeh v. Saadeh, Inc., 150 Md. App. 305, 819 A.2d. 1158, 1171 (Md. Ct. Spec. App. 2003). Thus Gantt appears to have forecast evidence that Claggett engaged in conduct that knowingly assisted or recklessly disregarded a high probability that Gantt would be subjected to severe emotional distress in connection with the second portion of her emotional distress claim.

This, however, does not end the inquiry.

B.

Because, as Gantt concedes, her emotional distress arose out of, and in the course of, her employment with Security USA, regardless of whether she forecast evidence sufficient to prove an intentional infliction of emotional distress claim, she must also offer evidence that her employer deliberately intended to injure her. This is so because the Maryland Workers' Compensation Act, Md. Code Ann., Lab. & Empl. § 9-509(a) - (b)(1999)(the Act), provides Gantt's exclusive remedy unless she can prove she was injured "as the result of the deliberate intent of [her] employer to injure" her. Id. § 9-509(d) (emphasis added). Maryland's high court has unequivocally held that this intentional tort exception to the Act's normal exclusivity rule requires proof of the employer's "actual, specific and deliberate intent to injure the employee." Johnson v. Mountaire, Farms of Delmarva, 305 Md. 246, 503 A.2d 708, 712 (Md. 1986). Proof of an employer's "willful,

wanton, or reckless conduct" even when that conduct is "undertaken with a knowledge and appreciation of a high risk to another" does not suffice. Id. An employee cannot bring a tort action based on such evidence; rather, in those circumstances, the Act provides an employee's exclusive remedy. Id.

In ruling on Security USA's motion to dismiss all of Gantt's tort claims on the ground that the Maryland Workers' Compensation Act provides her exclusive remedy for those claims, the district court clearly understood the proper relationship between the Act and common law torts. n2 The court dismissed Gantt's negligence, gross negligence, and negligent hiring claims because it found the Act barred Gantt from recovering from her employer in a tort action on these bases. But the court specifically refused to dismiss the intentional infliction of emotional distress claim, finding that the intent to injure exception of the Workers' Compensation exclusivity rule applied to it.

When considering Security USA's motion to dismiss Gantt's emotional distress claim, the district court carefully recounted Gantt's allegations as to Security USA's intent and found that, under Maryland law, Gantt had alleged facts sufficient to come within the intent to injure exception. In so concluding, the court relied on the most analogous Maryland case, Le, 324 Md. 71, 595 A.2d 1067. There, an employee sued his employer for intentional infliction of emotional distress after a company security guard coerced him into signing an allegedly untrue confession to theft, an act which assertedly caused the employee to cry, lose his job, and be unable to trust people or "sleep for weeks after his discharge." Id. at 1067. On these facts, the trial

court in Le granted the employer summary judgment, finding the Workers' Compensation Act provided the employee's exclusive remedy. Id. at 1070. Maryland's highest court reversed, holding that the "deliberate intent to injure" exception to the Workers' Compensation exclusivity rule applied, and so the "employer [could] be held liable" to his employee in tort for intentional infliction of emotional distress. Id. at 1074, 1075.

On appeal, Security USA does not contend that the district court erred in refusing to dismiss Gantt's emotional distress claim on grounds of Workers' Compensation exclusivity. Indeed, at oral argument Security USA acknowledged that this ruling was correct, given Gantt's "allegations." Security USA maintains, however, that on summary judgment the district court should have concluded that the "intent to injure" exception to Workers' Compensation exclusivity did not apply to Gantt's intentional infliction of emotional distress claim.

We cannot agree with this argument with respect to the first portion of Gantt's emotional distress claim -- that growing out of Claggett's intentionally assigning Gantt to unsecured Post # 9. Certainly in connection with that portion of her claim, Gantt has offered as much evidence of "deliberate intent to injure" as the plaintiff-employee in Le. n3 A jury could infer from the evidence proffered by Gantt that Security USA's supervisor, Claggett, despite awareness of Sheppard's abuse of Gantt and Gantt's well-founded fear of Sheppard, believed it all-important that Gantt and Sheppard "talk," and so deliberately determined to inflict on Gantt any emotional distress she might suffer

from talking to Sheppard, even talking to him face to face, at Post # 9 on December 7, 1996. Thus Gantt has offered evidence from which a jury could conclude, as she asserted in opposing Security USA's motion to dismiss, that "Claggett intentionally inflicted emotional distress upon Dominique Gantt when she ordered her to assume Post 9, while fearing for her life."

With respect to the second portion of Gantt's emotional distress claim -- that growing out of the abduction and rape -- however, we agree that Gantt has failed to offer evidence at the summary judgment stage sufficient to support her assertion at the motion to dismiss stage that Claggett "intentionally assigned Dominique Gantt to Post 9, with the intention and for the purpose of giving Gary Sheppard access to her so that he could assault her, batter her, [and] kidnap her." Gantt simply did not present evidence from which a reasonable jury could find that Claggett acted with an "actual, specific and deliberate intent" to cause, and with a "desire to bring about" the assault, battery, rape, and emotional distress resulting from them. See Johnson, 503 A.2d at 712. Just as in Johnson, Maryland's highest court affirmed the dismissal of Rodney Johnson's claim because he failed to allege facts "to show that [his] employer had a 'desire' to bring about the consequences of the acts or that the acts were premeditated with the specific intent to injure Rodney," so we must affirm the grant of summary judgment on this portion of Gantt's emotional distress claim because she has failed to offer evidence demonstrating that her employer "had a 'desire' to bring about" her abduction, rape, and resulting emotional distress, or that its "acts were premeditated with the specific intent" to impose this injury on her. Id.

IV.

In summary, we affirm the district court's order dismissing Gantt's sexual harassment claim and that portion of its order granting summary judgment on the emotional distress claim growing out of her abduction and rape. We reverse that portion of the order granting summary judgment on the emotional distress claim growing out of Claggett's intentional assignment of Gantt to unsecured Post # 9.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART

CONCURBY: NIEMEYER (In Part); LUTTIG (In Part)

DISSENTBY: NIEMEYER (In Part); LUTTIG (In Part)

FOOTNOTES

n1 On appeal, Gantt seeks to widen the legal basis of her constitutional claim, contending that she has alleged a "violation of the Fifth and Fourteenth Amendments of the Constitution, guaranteeing equal protection under the law pursuant to 42 U.S.C. § 1983." Brief of Appellant at 14 (emphasis added). We must reject this contention. Not only has Gantt failed to invoke the Fourteenth Amendment or § 1983 in her complaint, but she has also failed to assert any facts in the complaint giving rise to Security USA's liability as a state actor. Rather, Gantt's case for governmental action hinges on her allegations that Security USA acted under color of federal law. Moreover, the

arguments Gantt asserts in her appellate briefs would not establish state action, even if she had alleged the necessary underlying facts in her complaint.

n2 Security USA does not. Although the company recognizes that when, as here, an intentional tort causes the claimed injury, § 9-509(d) provides an exception to the normal Workers' Compensation Act exclusivity rule, it argues that this intentional tort exception somehow requires Gantt to prove as the "first prong" of her intentional infliction of emotional distress claim "a deliberate intent to injure." Brief of Appellee at 23. In fact, all "prongs" of an emotional distress claim -- including the first -- remain the same no matter who the plaintiff and defendant are. What the Workers' Compensation Act does do is preclude a covered employee from recovering from her employer in tort unless the employee was injured "as the result of the deliberate intent of the employer to injure." § 9-509(d). Thus the Act may preempt Gantt's ability to recover in a tort action for intentional infliction of emotional distress against Security USA, but, contrary to Security USA's suggestion, the Act does not change the quantum of proof necessary to establish the "first prong" of the tort.

n3 Judge Niemeyer contends that because Claggett was the lowest level supervisor, post at 19-20 (albeit the only supervisor at the time of the December 7 incident), her conduct should not be imputed to Security for purposes of the Workers' Compensation "intent to injure" exception. But Security, like any corporation, can act only through its agents, and Gantt has specifically alleged that Security acted through its agents, "particularly Sgt. Claggett," in its treatment of

her. Neither in moving for summary judgment nor on appeal has Security attempted to disavow any of Sgt. Claggett's conduct or argue that it should not be imputed to the company for purposes of the "intent to injure" exception. The company's reluctance to disavow Sgt. Claggett's conduct may well rest on its reading of the directive of the Le court that "for an employer to be held liable for the intentional torts of an employee committed within the scope of employment, the employee need not be the alter ego of the employer" and the "employee's acts need not be expressly authorized" by the employer. Le, 595 A.2d at 1074 (internal quotation marks and citations omitted). Although Le did not delineate the precise boundaries of the employer's vicarious liability in the context of the "intent to injure" exception, certainly its holding and Security's failure to argue that Sgt. Claggett's conduct could not be imputed to the company counsel against upholding the district court's grant of summary judgment on this alternative ground.

DISSENT: NIEMEYER, Circuit Judge, concurring in Part II of Judge Motz' opinion and dissenting from the judgment:

I concur in Part II of Judge Motz' opinion, which affirms dismissal of Dominique Gantt's claims under the Fifth Amendment and Title VII of the Civil Rights Act of 1964. But with respect to Gantt's claim for intentional infliction of emotional distress under state law, I would affirm the judgment of the district court, but on different grounds. Gantt has not shown that Security USA, Inc. (" Security USA"), her employer, "deliberately intended" to cause the injury that Gantt suffered, and therefore Gantt's state law claim against Security USA can only be made as a claim for benefits under the Maryland Workers' Compensation Act. Accordingly, I dissent from the judgment remanding this case to the district court for further proceedings.

I

Security USA, which contracted with the federal government to supply security for the New Carrollton federal building in Lanham, Maryland, employed Dominique Gantt as a security guard and assigned her to the New Carrollton building.

While assigned to the New Carrollton building, Gantt advised her employer that she had obtained a protective order against her boyfriend, Gary Sheppard, prohibiting him from contacting Gantt anywhere, including at her place of employment, and Gantt provided her supervisors with a copy of the protective order. Security USA's Project Manager Earl Wood instructed all Security USA supervisors, including

Gantt's supervisor, Sergeant Angela Claggett, to assign Gantt to an inside post to deny Sheppard access should he violate the protective order.

Sometime later, in November 1996, Sergeant Claggett transferred a telephone call from Sheppard to Gantt even though Claggett knew that it violated the protective order. Claggett, who knew Sheppard from another security job at which she worked, explained to Gantt, "All he wants to do is talk to you." Claggett urged Gantt, "Just talk to him." Gantt took the telephone call, told Sheppard not to call again, and hung up. After hanging up, Gantt reported the call to Project Manager Wood.

Several weeks later, on December 6, 1999, Sergeant Claggett assigned Gantt to guard the underground garage, Post 9, which was an "outside post." Within 15 minutes of taking the post, Gantt received another telephone call from Sheppard. After the call, Gantt notified Claggett of the call and requested to be reassigned to a location inside the building, in accordance with Project Manager Wood's order. Sergeant Claggett insisted that Gantt remain at her post.

Approximately 45 minutes later, Sheppard arrived at the New Carrollton building and went to Post 9, where he physically abducted Gantt with a shotgun, forced her into his van, and drove away. When Sergeant Claggett was advised of the abduction, she refused to call the police, stating, "No, we don't need to call the police because [Sheppard] doesn't want to hurt her, he just wants to talk to her." But five to ten minutes later, she nevertheless did call the police.

In the meantime, Sheppard drove Gantt from the New Carrollton building into the District of Columbia, Maryland, and Delaware. He verbally abused Gantt, threatened her, physically assaulted her, and raped her. In order to extricate herself from Sheppard's control, Gantt promised Sheppard a reconciliation if he would voluntarily turn himself in to the police. When he complied, the police arrested him.

Gantt commenced this action against Security USA alleging a violation of the Fifth Amendment, a violation of Title VII of the Civil Rights Act, and the commission of two state law torts -- intentional infliction of emotional distress and negligence. The district court dismissed the federal law counts and the negligence count on the ground that they failed to state claims upon which relief could be granted. With respect to the claim for intentional infliction of emotional distress, the district court granted summary judgment in favor of Security USA. This appeal followed.

II

With respect to Gantt's appeal from the district court's dismissal of her federal claims, I concur in what Judge Motz has written in Part II of her opinion, and therefore, I do not address those claims any further. Gantt did not appeal the dismissal of her negligence claim.

III

With respect to Gantt's claim that Security USA is liable to Gantt on her claim of intentional infliction of

emotional distress, I would affirm the judgment of the district court for the reasons that follow.

The parties seem to agree that Gantt's claims against Security USA for her injuries arose "in the course of" her employment with Security USA. See Knoche v. Cox, 282 Md. 447, 385 A.2d 1179, 1182 (Md. 1978) ("'An injury arises "in the course of employment" when it occurs within the period of employment at a place where the employee reasonably may be in the performance of [her] duties and while [she] is fulfilling those duties or engaged in doing something incident thereto'" (quoting Watson v. Grimm, 200 Md. 461, 90 A.2d 180, 183 (Md. 1952))). The district court observed likewise:

It is undisputed that Gantt suffered her injuries at the hands of a third party, Sheppard, while at work, and that she was on duty at the time and expected to be at her post.

Thus, Gantt was an employee covered by the Maryland Workers' Compensation Act. See Md. Code Ann., Lab. & Empl. § 9-101(b), (f).

Except for specified intentional conduct, the Maryland Workers' Compensation Act provides the exclusive remedy for injuries sustained by an employee in the course of employment. See id. § 9-509(a), (b) (" The liability of an employer under this title is exclusive [and] the compensation provided under this title to a covered employee . . . is in place of any right of action against any person"); Hastings v. Mechalske, 336 Md. 663, 650 A.2d 274, 278 (Md. 1994). Under the Act, Security USA would thus have to compensate Gantt for

any "accidental personal injury" that Gantt were to sustain in the course of her employment, regardless of fault as to the cause of injury. See DeBusk v. Johns Hopkins Hosp., 342 Md. 432, 677 A.2d 73, 76-77 (Md. 1996). "Accidental personal injury" occurs and the Workers' Compensation Act applies even to injuries to an employee willfully caused by a third person, so long as the injury was sustained in the course of employment. See Edgewood Nursing Home v. Maxwell, 282 Md. 422, 384 A.2d 748, 753 (Md. 1978) (applying the Act to a nurse killed by her boyfriend for reasons unrelated to her job). Accordingly, Gantt's claim for intentional infliction of emotional distress against Security USA is barred by the immunity conferred by the Act unless her claim falls within the narrow exception provided by § 9-509(d) of the Act, which authorizes common law claims for injuries caused by the deliberate conduct of her employer. That section provides:

If a covered employee is injured or killed as the result of the deliberate intent of the employer to injure or kill the covered employee, the covered employee or, in the case of death, a surviving spouse, child, or dependant of the covered employee may:(1) bring a claim for compensation under this title; or

(2) bring an action for damages against the employer. Md. Code Ann., Lab. & Empl. § 9-509(d). This exception to the immunity from common law liability requires that the injury to the employee be the result of the employer's deliberate intent to injure, not simply deliberate conduct. The Act links the injury with the specific intent to bring about that injury. While the plain language of § 9-509(d) imposes that linkage, any

doubt is removed by the decision in Johnson v. Mountaire Farms, 305 Md. 246, 503 A.2d 708 (Md. 1986). In Johnson, the Maryland Court of Appeals held that a suit against an employer for the death of a worker where the employer placed the worker in dangerous conditions did not qualify for the "deliberate intention" exception to the Maryland Workers' Compensation Act and thus was barred. Interpreting the antecedent to § 9-509(d) (Md. Ann. Code art. 101, § 44), * the court embraced the majority view that "'deliberate intention' . . . implies the formation by the employer of a specific intention to cause injury or death combined with some action aimed as accomplishing such result." Johnson, 503 A.2d at 711 (emphasis added). The court specifically rejected the minority approach of West Virginia, which interpreted "deliberate intent" to include "'wilful, wanton and reckless misconduct,'" id. (quoting Mandolidis v. Elkins Indus., Inc., 161 W. Va. 695, 246 S.E. 2d 907, 914 (W. Va. 1978)). In applying this specific-intent-to-injure requirement, the Court of Appeals in Johnson rejected the plaintiff's argument that "deliberate intention . . . requires only that the employer intentionally do the act which happens to cause injury," adopting rather the interpretation that the deliberate intention exception "requires actual, specific and deliberate intent to injure the employee." Id. at 711-12; see also Federated Dep't Stores, Inc. v. Le, 324 Md. 71, 595 A.2d 1067, 1074 (Md. 1991).

Turning to this case, if Security USA's conduct is analyzed by the actions of its Project Manager Wood, then there is undoubtedly no liability for a common law claim. Wood expressly instructed Sergeant Claggett to assign Gantt to an inside post, undoubtedly to protect, not to injure Gantt. Claggett's disobedience of Wood's

direction may be her deliberate conduct, but because that conduct was in contradiction of Wood's order, it cannot be considered as evidence that Security USA, Gantt's employer, deliberately intended to injure Gantt. To the contrary, Security USA's intent is manifested by the order of Project Manager Wood, which must be construed as an order to protect Gantt from harm.

Not all conduct by every employee is imputed to the employer for the purposes of the Maryland Workers' Compensation Act. Maryland courts historically restricted liability to acts authorized by the employer or performed by the employer's alter ego. See, e.g., Schatz v. York Steak House Sys., Inc., 51 Md. App. 494, 444 A.2d 1045 (Md. App. 1982) (concluding that the conduct of an assistant manager of a restaurant in raping a fellow employee was not the intentional act of the employer so as to constitute the deliberately intended conduct of employer under the Act); Cont'l Cas. Co. v. Mirabile, 52 Md. App. 387, 449 A.2d 1176 (Md. App. 1982) (concluding that the deliberate conduct of a supervisor directed at an employee did not amount to the intentional conduct of employer under the Act). Although the Maryland Court of Appeals in Federated Dep't Stores cast doubt on the "alter ego" approach, the court also noted that "it may well be that the General Assembly . . . intended something less than the full sweep of common law respondeat superior liability" in drafting the Workers' Compensation Act. 595 A.2d at 1074. In this case, Claggett was the lowest level supervisor of the New Carrollton building reporting directly to a general local supervisor and then indirectly to Project Manager Wood. Her conduct as it related to Gantt was not only unauthorized, but expressly disallowed, by her own supervisor. Under

any analysis of Security USA's common law liability under Maryland's Workers' Compensation Act for its employees' conduct, Claggett's overt disobedience to the order of Project Manager Wood should not be imputed to Security USA.

But even if we were to impute Sergeant Claggett's conduct to Security USA, the evidence does not support a claim that Sergeant Claggett "deliberately intended" the injury suffered by Gantt. To the contrary, the only evidence in the record supports a conclusion that Sergeant Claggett personally knew Sheppard and believed that he had only intended to talk to Gantt and work things out. I agree with the district court's summary of the record where the court concluded: Taking as true that Claggett assigned Plaintiff to the outside post and failed to call the police after the abduction, there is still no evidence to suggest that Claggett intended for Plaintiff to suffer, or even recklessly disregarded the possibility of, the severe emotional trauma of being abducted, assaulted, threatened and raped. To the contrary, the evidence agreed to by Plaintiff in her statement of undisputed facts shows that Claggett told Harvey that Sheppard only wanted to talk to Plaintiff and would not hurt her. At most, one could conclude from the record that Sergeant Claggett was negligent or even reckless. But a common law claim for injury from even wanton or reckless conduct is barred by the Maryland Workers' Compensation Act. See Johnson, 503 A.2d at 711 (barring common law claims based on "gross, wanton, wilful or reckless" conduct). Thus, regardless of whether or how Claggett's conduct might satisfy Maryland's requirements for intentional infliction of emotional distress, Claggett's conduct, as demonstrated

by the record in this case, does not allow Gantt to escape from the bar imposed by the Maryland Workers' Compensation Act because that Act requires that the employer deliberately intend to bring about the injury of which Gantt complained, and there is no evidence to support that conclusion even if Claggett's conduct were imputable to Security USA.

My colleagues suggest that factual questions remain about Claggett's intent to injure based on circumstances that Claggett knew of facts underlying the protective order against Sheppard and that Claggett must have intended the uncomfortable anxiety that Gantt suffered in manning Post 9 before Sheppard arrived. Were such injury the totality of the matter, it surely would fall short of constituting injury for purposes of either the Maryland Workers' Compensation Act or intentional infliction of emotional distress. Moreover, the record in this case provides no support, absent speculation, that Claggett even intended to injure Gantt by creating anxiety for her. To the contrary, the record shows that Claggett was intending to act, however clumsily, as counselor or peacemaker, assuring Gantt that Sheppard only wanted to talk to her and repair their relationship. Claggett's misguided judgment and perhaps even recklessness, however, cannot support a finding that she deliberately intended to injure Gantt. See Johnson, 503 A.2d at 711.

Because the conduct alleged and established on the record for summary judgment does not fit the narrow exception to common law immunity provided by the Maryland Workers' Compensation Act, Gantt's claim against Security USA must be for benefits under that Act, and I would therefore affirm the district court's

summary judgment in favor of Security USA on Gantt's common law claim, but for reasons different from those given by the district court.

LUTTIG, Circuit Judge, concurring in part and dissenting in part:

I join Part II of the majority opinion, affirming the district court's dismissal of Gantt's sexual harassment claim. I also concur in Part III, insofar as it reverses the district court's order of summary judgment as to the emotional injuries suffered by Gantt as she waited outside at Post 9.

I dissent, however, from the majority's affirmance of the district court's order dismissing Gantt's claim against Security USA for the emotional distress she suffered as a result of her abduction, torture and rape, as barred by the Maryland worker's compensation laws. In my judgment, Gantt has presented sufficient evidence to support a jury verdict that Security USA, acting through supervisor Claggett, "deliberately intended" for Gantt to be abducted, tortured and raped by Sheppard and to suffer the severe emotional injuries that resulted therefrom. Therefore, I would hold that this portion of Gantt's claim for intentional infliction of emotional distress may be brought by Gantt outside of the provisions of the Maryland workers' compensation laws.

I.

The majority holds, and I agree, that Gantt presented sufficient evidence to withstand summary judgment on each of the elements of her tort claim for intentional

infliction of emotional distress against Security, USA for her injuries from the abduction, torture and rape. See ante at 10-11. It nevertheless affirms the district court's order dismissing Gantt's claim as to these injuries because it holds that Gantt did not present sufficient evidence to bring herself within the terms of the exception to the Workers' Compensation Act's general prohibition on employee suits for workplace injuries outside the workers' compensation scheme. See Md. Code Ann., Lab. & Empl. § 9-509(a) , (b). The exception, set forth in Md. Code § 9-509(d), provides that Gantt "may bring an action for damages against her employer" if she demonstrates that she was injured "as the result of the deliberate intent of [her] employer to injure" her. See Md. Code Ann., Lab. & Empl. § 9-509(d); Johnson v. Mountaire Farms of Delmarva, Inc., 305 Md. 246, 503 A.2d 708, 712 (Md. 1986).

In holding that Gantt has not presented evidence from which a reasonable jury could conclude that Security USA "deliberately intended" to injure Gantt, I believe the majority has failed to draw reasonable inferences from the evidence, taken in the light most favorable to Gantt, and, in so doing, decided itself a factual question that should have been left to a jury instead.

Claggett, Gantt's supervisor, and Sheppard, her former boyfriend and attacker, were friends from work and they often discussed Sheppard's relationship with Gantt. Claggett knew that Sheppard had previously abused and threatened to kill Gantt. She knew that Sheppard was barred by court order from having any contact with Gantt. And she knew that, by order of manager Earl Wood, Gantt was not to be stationed at an outside post, in order that she be protected from

Sheppard. Yet, on the very morning in question, Claggett ordered Gantt to report to post 9, an outside post, ignoring both the instructions given to her only a few minutes earlier by Willie Jones, the supervisor that preceded her, and Gantt's own pleas that she would not be safe if located at post 9. Then, within fifteen minutes of Gantt assuming post 9, Claggett knowingly violated the protective order against Sheppard and transferred a telephone call from him to Gantt. Alarmed by Sheppard's call, Gantt again pleaded with Claggett that she be transferred from post 9 to an inside post where she would not be vulnerable. Claggett rebuffed Gantt, insisting that she remain at post 9. Less than an hour later, Sheppard arrived at post 9 and kidnapped Gantt at gunpoint. When told that Gantt had been abducted at gunpoint and was being driven away in a van, Claggett even still refused to intervene to protect Gantt by calling the police, instructing other employees not to be alarmed.

A reasonable jury could take Claggett at her word, as both the majority and Judge Niemeyer appear to do, and conclude from these facts that she intended nothing more than for Sheppard to talk to Gantt at her post on the morning in question, and, therefore, that her obstinate disregard of both Sheppard's threats and the repeated admonitions of her immediate supervisor, the supervisor that she replaced, and Gantt herself amounted only to "misguided judgment" or "recklessness" in light of the danger Sheppard posed to Gantt.

But a reasonable jury need not reach such an innocent conclusion as to Claggett's motivations. It could just as readily find that Claggett acted intentionally and in

concert with Sheppard on the morning in question, not, as Judge Niemeyer contends, as a "counselor or peacemaker" to Gantt and Sheppard. Ante at 21 (opinion of Niemeyer, J.). Such a jury could draw the inference that it was not mere coincidence that Sheppard arrived at post 9 at 7 a.m. on the same morning that, just an hour earlier, Claggett had stationed Gantt at that same post, but, instead, that Sheppard arrived there because Claggett had arranged with Sheppard for him to have access to Gantt at that time and place. It could also infer that Claggett refused Gantt's pleas to be moved to an inside post for the very reason that Claggett did intend to facilitate Sheppard's access to Gantt. Such a jury could further determine that when Claggett, having just been told by frantic security guards that Sheppard abducted Gantt at gunpoint, assured her fellow guards, "no, we don't need to call the police because Sheppard] doesn't want to hurt her, he just wants to talk to her," she spoke, not because she actually believed that such was Sheppard's purpose, but, rather, to prevent those guards from interfering with Sheppard's abduction of Gantt. And that Claggett ultimately called the police herself five to ten minutes later, not because she suddenly became convinced that Sheppard may have something else in mind, but rather because she surmised (correctly) that, by this time, Sheppard would have had the opportunity to leave the premises with Gantt.

These inferences are not, of course, compelled, but each would be well-supported by the evidence in this case. And, were a jury to so conclude, it could determine that Claggett's actions, taken as a whole, demonstrated a deliberate intent "to bring about the consequences of [her] acts," see Johnson, 503 A.2d at 712, Gantt's

abduction, torture and rape, as well as the emotional injuries that attended each.

On this basis, I would reverse the district court's judgment outright and remand for trial.

II.

Judge Niemeyer suggests an additional reason that Gantt may not proceed with her claim outside of the provisions of the Workers' Compensation Act, namely, that Claggett's actions cannot be imputed to Security, USA because "Claggett was the lowest level supervisor of the New Carrolton building" and her actions were "not only unauthorized, but expressly disallowed" by a superior's order. See ante at 20 (opinion of Niemeyer, J.). The majority opinion dismisses this suggestion in a footnote for the entirely valid reason that Security USA itself has not attempted, either before the district court or on appeal, to disavow that Claggett was acting as its agent in stationing Gantt at an outside post. See ante at 13 n. 3. But in any event, in so contending, Judge Niemeyer distorts the law of Maryland, as set forth by the Maryland Court of Appeals in Federated Dep't Stores Inc. v. Le, 324 Md. 71, 595 A.2d 1067 (Md. 1991).

The Maryland courts have not, contrary to Judge Niemeyer's assertion, "historically restricted liability to acts authorized by the employer or performed by the employer's alter ego." Ante at 29 (Opinion of Niemeyer, J.). In fact, when the Maryland Court of Appeals considered the question over a decade ago, it did not merely "cast doubt" on the alter ego approach. It expressly declined to read the Maryland Workers'

Compensation Act to require a showing that the employee was the "alter ego" of the employer, rejecting the approach taken in Schatz v. York Steak House Sys., Inc., 51 Md. App. 494, 444 A.2d 1045 (Md. App. 1982) and Cont'l Cas. Co. v. Mirabile, 52 Md. App. 387, 449 A.2d 1176 (Md. App. 1982). See Le, 595 A.2d at 1074 (holding that the 'intent to injure' exception to the general exclusivity of the workers' compensation act does not "embody[]the particular restriction upheld . . . in Mirabile and Schatz"). Moreover, the Le court made clear that the act in question need not be taken by an employee with the "express authorization" of the employer itself before it could be imputed to that employer. Id.

Finally, while Le did state that, "it may well be that the General Assembly, by the language 'deliberate intention of his employer to produce such injury,' intended something less than the full sweep of common law respondeat superior liability," id., there is nothing in the Maryland case law to suggest that the legislature intended to protect an employer from suit where, as here, its supervisor acted, as a supervisor, in the normal course of her employment, with the deliberate intent to injure another employee -- simply because that supervisor's action violated the order of an absent, higher-ranking company official. Cf. Hastings v. Mechalske, 336 Md. 663, 650 A.2d 274, 281 (Md. 1994) (holding that, "the employer remains liable with respect to the duty, regardless of the acts or omissions of the person entrusted to perform it"). Nor would such a rule be wise. Whether or not there were other people above Claggett in the Security, USA hierarchy, there is no question that, on the morning of Gantt's abduction, Claggett was the supervisor in charge of the New

Carrolton building for Security, USA. As an employee of Security, USA, Gantt had no choice but to abide Claggett's orders; there were, after all, no higher-ranking authorities present to whom Gantt could appeal. That Claggett's order represented the order of her employer is the only reason that Gantt remained outside at post 9, in fear for her life.

Moreover, were we to hold that a supervisor's actions could not be imputed to an employer whenever the employer had a standing policy against the action taken by a supervisor, it would render the 'intent to injure' exception to exclusivity set forth in section 9-509(d) a near nullity, relevant only to those rare occasions when an employer did not have a policy of some sort forbidding actions taken with a "deliberate intent" to kill or injure another employee. Without any guidance in the statutory text or the caselaw, I would never so restrictively interpret this provision.

FOOTNOTES

* In the recodification of the Maryland Code in 1991, Article 101 was placed in the Labor and Employment Article as § 9-101 et seq., and § 44 was revised and included as § 9-509(d) with the intent of making no "substantive change." See 1991 Md. Laws ch. 8, § 2 (revisor's note).

Civil Action No. DKC 2000-0637

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

DOMINIQUE K. GANTT

v.

SECURITY, USA, INC.

December 4, 2002

MEMORANDUM OPINION

Pending before the court and ready for resolution in this intentional infliction of emotional distress case are the motion for summary judgment of Defendant Security, USA, Inc. ("Security USA") and the cross-motion for summary judgment of Plaintiff Dominique K. Gantt. No hearing is deemed necessary, and the court now rules pursuant to Local Rule 105.6. For the reasons that follow, the court will grant Defendant's motion for summary judgment and deny Plaintiff's cross-motion for summary judgment:

I. Background

Plaintiff Dominique K. Gantt, a Maryland resident, asserts a claim for intentional infliction of emotional distress against herformer employer, California-based Security USA, for assigning Plaintiff to a work post that exposed her to a confrontation with an ex-boyfriend against whom she had a restraining order. Pursuant to a contract with the federal government,

Security USA provided, security for the Internal Revenue Service building in Lanham, Maryland. Plaintiff was employed by Security USA at that location as a security officer, commencing on or about September 16, 1996. On or about November 6, 1996, Plaintiff obtained a protective order in the Circuit Court for Charles County against her ex-boyfriend, Gary Sheppard, who had been harassing her in an attempt to rekindle their relationship. The protective order prohibited Sheppard from contacting Plaintiff anywhere, including at her place of employment. Plaintiff informed Security USA Project Manager Earl Wood of the protective order, and Wood in turn informed supervisory personnel that Plaintiff should be assigned to guard only "secured areas" to prevent Sheppard from gaining access to her while at work. Plaintiff was accordingly assigned to Post 6, the loading dock, which is an indoor post. See Paper no. 49, Gantt Depo., ex. A at 23; Paper no. 48, Claggett Depo. at 77-78.

At some point in November 1996, Sgt. Angela Claggett, a security officer who supervised Plaintiff, transferred a telephone call from Sheppard to Plaintiff. See Paper no. 49, Gantt Depo., ex. A at 75, 79-81. Upset by the call, Plaintiff told Wood about the incident, and the latter promised to speak with Claggett and, tell her to refrain from transferring subsequent calls from Sheppard. Apparently, unbeknownst to Wood and others at Security USA, Claggett and Sheppard worked together during the week foranother security company. Claggett was apparently aware of problems between Plaintiff and Sheppard and was also aware that Sheppard had said he was going to kill Plaintiff, his estranged wife, his children and himself. See Paper no.

48, Claggett Depo. at 22, 53-54, 75-78. Claggett reported Sheppard's threats of violence to Captain Sands of Wackenhut Services, Sheppard's employer. See id. at 22-23.

On December 7, 1996, Claggett served as the weekend supervisor at the IRS Building and, in that capacity, assigned security officers to their posts. Claggett assigned Plaintiff to guard an underground garage, Post 9, an "outside post," thus making her accessible to the public. [1] Paper no. 49, Gantt Depo. , ex. A at 8485, 87; Paper no. 48, Harvey Depo. at 15. Plaintiff protested this assignment, reminding Claggett of the threats made by Sheppard, the restraining order, and Wood's order to place Plaintiff only at, inside posts. See Paper no. 49, Gantt Depo., ex. A at 84-85, 87. Claggett, however, allegedly insisted that Plaintiff assume Post 9, which Plaintiff did out of fear of losing her job. See id. Between 6: 10 and 6:15 a.m. , within f if teen minutes of assuming her, assignment at Post 9, Plaintiff received a telephone call from Sheppard at that post. See id. at 89-91. Upon receiving the phone call from Sheppard, Plaintiff feared for her safety and notified Claggett of the telephone call, requesting to be reassigned to a location inside the building as Wood had directed. See id. at 12728. Apparently disobeying Wood's orders, Claggett refused. Plaintiff's request and required Plaintiff to remain at Post 9. See id. at 125-27.

At approximately 7:00 a.m., within 45 minutes of calling Plaintiff, Sheppard arrived at the facility, went to Post 9 and. proceeded toward Plaintiff. Plaintiff ran in search of safety, and, Sheppard chased her through the area surrounding Post 9, pulling out a shotgun from his trench coat and shouting "Run! Run!" Sheppard caught

Plaintiff, grabbed her by the arm, pressed the shotgun to her face and put her in a choke hold. He then dragged her off the premises, allegedly in the presence of two other security guards. Sheppard forced Plaintiff into his van at gunpoint, drove her through the District of Columbia and other locations, threatened to kill her, assaulted and raped her. Sheppard held her captive for six hours, eventually surrendering to police after Plaintiff told him that she would reconcile with him and that she would tell police that she went with him willingly. [2]

One of the officers who witnessed the scene between Plaintiff and Sheppard reported it to Claggett and another Security USA officer, Darren Harvey. See Paper no. 48, Harvey Depo. at 34. Harvey suggested to Claggett that they call the police, but. Claggett allegedly told him there was no need because Sheppard only wanted to talk to Plaintiff and would not hurt her. See id. at 41-43. [3] Someone eventually called the police. When Plaintiff returned to work at the IRS facility, she was forced to work under Claggett, who maintained her position as a supervisor. Plaintiff claims that as a result of the abduction and rape of December 7, 1996 and being forced to work under Claggett thereafter, she experienced emotional distress in the form of recurring nightmares, physical anxiety attacks and other "mental health issues." Paper no. 49, Gantt Depo., ex. A at 155-59, 167-71. She claims that she has undergone medical evaluation and has suffered losses for medical expenses and lost wages, as well as physical and mental injury. See id. at 146-50.

Plaintiff filed this action in the Circuit Court for Prince George's County. She then filed an amended complaint

pro se and subsequently obtained new counsel. Because Plaintiff's amended complaint contained a federal question claim involving sexual, harassment/hostile work environment, Defendant removed the case to this court. On January 8, 2001, this court granted Defendant's motion to dismiss with respect to the federal sexual harassment claim, as well as claims for negligence, gross negligence and reckless disregard for human life and safety, and reckless and/or negligent infliction of emotional distress. The common law negligence-related claims were dismissed because worker's compensation is the exclusive remedy available to Plaintiff for such claims. [4] The court denied the motion to dismiss with respect to the claim for intentional infliction of emotional distress because of an exception in the worker's compensation statute which allows an employee who is "injured or killed as the result of the deliberate intent of the employer to injure or kill" the employee to choose between seeking worker's compensation or bringing an action against the employer for damages. See MD. CODE ANN. , LAB. EMPL. § 9-509(d). It is solely this claim for intentional infliction of emotional distress that is at issue in the pending motion and cross-motion for summary judgment.

II. Standard of Review

It is well established that a motion for summary judgment will, be granted only if there exists no genuine issue as to any material. fact and the moving party is entitled to judgment as a matter of law. FED. R. Civ. P. 56 (c); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986) ; Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). In other words, if there clearly exist

factual issues "that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party," then summary judgment is inappropriate. Anderson, 477 U.S. at 250; see also Pulliam Inv. Co. v. Cameo Properties, 810 F . 2 d 1282, 1286 (4th Cir. 1987) ; Morrison v. Nissan Motor Co., 601 F. 2d 139, 141 (4th Cir. 1979); Stevens v. Howard D. Johnson Co., 181 F. 2d 390, 394 (4th Cir. 1950). The moving party bears the burden of showing that there is no genuine issue as to any material fact. FED. R. CIV. P. 56(c); Pulliam Inv. Co., 810 F. 2d at 128 (citing Charbonnages de France v. Smith, 597 F.2d 406, 414 (4th Cir. 1979)).

When ruling on a motion for summary judgment, the court must construe the facts alleged in the light most favorable to the party opposing the motion. See Diebold, 369 U.S. at 655; Gill v. Rollins Protective Servs. Co., 773 F.2d 592, 595 (4th Cir. 1985). A party who bears the burden of proof on a particular claim must factually support each element of his or her claim. "[A] complete failure of proof concerning an essential element . . . necessarily renders all. other facts immaterial." Celotex Corp., 477 U.S. at 323. Thus, on those issues on which the nonmoving party will have the burden of proof, it is his or her responsibility to confront the motion for summary judgment with an affidavit or other similar evidence. Anderson, 477 U.S. at 256. In Celotex Corp., the Supreme Court stated:

In cases like the instant one, where the nonmoving party will bear the burden of proof at trial on a dispositive issue, a summary judgment motion may properly be made in reliance solely on the "pleadings, depositions, answers to interrogatories, and admissions

on file.'" Such a motion, whether or not accompanied by affidavits, will be "made and supported as provided in this rule," and Rule 56(e) therefore requires the nonmoving party to go beyond the pleadings and by her own affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial."

Celotex Corp., 477 U.S. at 324. However, ""a mere scintilla of evidence is not enough to create a fact issue."' Barwick v. Celotex Corp. , 736 F.2d 946, 958-59 (4th Cir. 1984) (quoting Seago v. North Carolina Theaters, Inc., 42 F.R.D. 627, 632 (E.D.N.C. 1966), aff'd, 388 F.2d 987 (4th Cir. 1967)). There must be "sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may, be granted." Anderson, 477 U.S. at 249-50 (citations omitted).

In cases where a court is confronted with a cross-motion for summary judgment, the court must consider each party's motion individually to determine if that party has satisfied the summary judgment standard. See Kohl v. Association of Trial Lawyers of America, et al., 183 F.R.D. 475, 478 (D.Md. 1998) (citing 10A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure, § 2720 (1983)). Therefore, in determining whether genuine and material factual disputes exist, the court has considered the parties' respective memoranda and the exhibits attached thereto and has construed all facts and reasonable inferences drawn therefrom in the light most favorable to the respective non-movant. See id. (citing Matsushita

Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986)).

III. Analysis

In order to prevail on a claim of intentional infliction of emotional distress, a plaintiff must show that: (1) the conduct was intentional or reckless; (2) the conduct was extreme and outrageous; (3) there is a causal connection between the wrongful conduct and the emotional distress; and (4) the emotional distress is severe. See Green v. The Wills Group, Inc., et al., 161 F.Supp.2d 618, 623 (D.Md 2001) (citing Harris v. Jones, 281 Md. 560, 565, 380 A. 2d 611, 614 (1977); Christian v. Minnesota Min. Mfg. Co., 126 F. Supp.2d 951, 959 (D. Md. 2001); Manikhi v. Mass Transit Admin., 360 Md. 333, 366, 758 A. 2d 95, 113 (2000). Courts have rarely upheld such claims and the Court of Appeals has, cautioned that: "its balm [is] reserved for those wounds that are truly severe and incapable of healing themselves." FigueiredoTorres v. Nickel, 321 Md. 642, 653, 584 A.2d 69, 75 (1991) (quoting Hamilton v. Ford Motor Credit Co., 66 Md.App. 46, 61, 502 A.2d 1057, 1065 (1986). See also Batson v. Shiflett, 325 Md. 684, 734, 602 A.2d 1191, 1216 (1992) (identifying only three instances in which claims of intentional infliction of emotional distress were upheld).

In its motion for summary judgment, Defendant focuses on the first element of the tort, contending that there is no evidence to suggest that anyone connected with Defendant acted with the deliberate intent to "bring about the crime visited upon the Plaintiff." [6] Paper no. 48 at 5. In explaining the first element, Maryland courts have regularly held that "'the plaintiff must allege and

prove that the defendant either desired to inflict severe emotional distress, knew that such distress was certain or substantially certain to result from his conduct, or acted recklessly in deliberate disregard of a high degree of probability that the emotional distress will follow.'" Estate of Aicalde v. Deaton Specialty Hosp. Home, Inc., 133 F.Supp.2d 702, 712 (D.Md. 2001) (quoting Foor v. Juvenile Services Admin., 78 Md.App. 151, 175, 552 A. 2d 947, 959 (1989)) (emphasis in original). The courts have further indicated that a plaintiff must provide some evidence of animus and have distinguished the concept of "foreseeability" in. this tort from that of negligence. See id. Specifically, the court held in Foor, that "to establish this intentional tort, the foreseeable consequence must be far more precise, for it is the achievement of that consequence, from which the distress is expected to arise, that lies at the heart of the tort." Foor, 78 Md.App. at 175, 552 A.2d at 959.

In the instant case, Plaintiff has failed to offer evidence sufficient to show animus on the part of Claggett and/or that Claggett desired for Plaintiff to suffer severe emotional distress. However, it appears to the court that Plaintiff has forecasted evidence that Claggett's assignment of Plaintiff to Post 9 was an intentional act given that Claggett was aware that Sheppard had talked about killing Plaintiff, that Plaintiff was afraid of Sheppard, and that she had obtained a restraining order against him. Looking at the evidence in the light most favorable to Plaintiff, one could conclude that Claggett intentionally assigned Plaintiff to a post where she knew Plaintiff would be in fear and then refused Plaintiff's requests to leave the post after Sheppard called her there.

Although the court finds evidence to support the claim that Claggett acted intentionally in placing Plaintiff at Post 9 and. requiring her to remain there, Plaintiff has not established that the fear she suffered while waiting at the post meets the "high burden imposed by the requirement that a plaintiff's emotional distress be severe." Manikhi, 360 Md. at 369, 758 A.2d at 114. Thus, the third element of the tort, which requires a causal, connection between the intentional conduct and severe emotional distress, has not been fulfilled. The court acknowledges that evidence of the emotional distress suffered by Plaintiff as, a result of the abduction, rape and other horrific acts perpetrated by Sheppard likely would meet the high burden of "severe emotional, distress"; that emotional trauma, however, was caused by Sheppard, not by Claggett. Even taking as true that Claggett assigned Plaintiff to the outside post and failed to call the police after the abduction, there is still no evidence to suggest that Claggett intended for Plaintiff to suffer, or even recklessly disregarded the possibility of, the severe emotional trauma of being abducted, assaulted, threatened and raped. To the contrary, the evidence agreed to by Plaintiff in her statement of undisputed facts shows that Claggett told Harvey that Sheppard only wanted to talk to Plaintiff and would not hurt her. See Paper no. 49, Attach. ¶ 37. once again, therefore, the causal link between wrongful intentional conduct and severe emotional distress required by the third prong is absent. Because Plaintiff has not provided evidence sufficient to establish a causal connection between intentional conduct and severe emotional distress, and there is no genuine dispute as to a fact material to this question, Defendant is entitled to judgment, as a matter of law. [7]

III. Conclusion

For the foregoing reasons, the court will grant Defendant's motion for summary judgment pursuant to FED. R. Civ. P. 56 and willdeny Plaintiff's cross-motion for summary judgment. A separate Order will be entered.

DEBORAH K. CHASANOW
United States District Judge
December 4, 2002.

FOOTNOTES

[1] The account of the facts in this section relies largely on the statement of undisputed facts submitted by Plaintiff as an attachment to her opposition motion. The court notes that in Claggett's deposition, she denied that she assigned Plaintiff to Post 9, claiming instead that Plaintiff had already assumed Post 9 by the time Claggett arrived at work. See Paper no. 48, Claggett Depo. at 24. Claggett further claims that she called Captain Shirley Stevens to inquire as to why Plaintiff was at Post 9 and that Captain Stevens replied that Plaintiff had requested to return to her regular post, which was Post 9. See id. at 25, 26. For the purposes of Defendant's motion for summary judgment, however, the court must construe the facts alleged in the light most favorable to Plaintiff. See United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).

[2] Plaintiff alleges that Sheppard was convicted on November 5, 1997 of kidnapping, rape and violation of a protective order and was sentenced to 20 years imprisonment for these crimes. Paper no. 16, ¶ 53.

[3] Claggett disputes Plaintiff's allegation that she resisted calling the police, claiming instead that she called Prince George's County police within 5-10 minutes of being informed about the abduction. See Paper no. 48, Claggett Depo. at 31-32, 65.

[4] With limited exceptions, the Maryland Worker's Compensation Act ("WCA"), MD. CODE ANN. , LAB. & EMPL. §§ 9-101, et seq., (Repl. Vol. 1999), provides the exclusive remedy for employees injured at work. See § 9-509(a)-(b) ("[T]he liability of an employer under this title is exclusive . . . [and] the compensation provided under this title to a covered employee . . . is in place of any right of action against any person."); Hastings v. Mechalske, 336 Md. 663, 672, 650 A.2d 274, 278 (1994). The WCA reaches claims involving both intentional torts, Tynes v. Shoney's Inc., 867 F. Supp. 330, 331 (D. Md. 1994) (battery), and negligence, Brady v. Parsons Co., 327 Md. 275, 278, 609 A.2d 297, 298 (1992) (negligent failure to keep workplace safe).

[5] The Court of Appeals of Maryland has held that the exception outlined in § 9-509(d) applies if an employee commits a tort against another employee. Federated Department Stores Inc. v. Le, 324 Md. 71, 81, 595 A.2d 1067, 1072 (1991) (holding that a corporate defendant could be sued for, inter alia, intentional infliction of emotional distress, after store's security personnel coerced the plaintiff into signing an allegedly untrue confession that he stole merchandise).

[6] The Court of Appeals of Maryland has held that an employer may be sued for an intentional tort committed by one employee against another even if the offending employee's actions were not expressly authorized by

the employer. See Federated Department Stores, 324 Md. at 81, 595 A.2d at 1074.

[7] Because the court will grant Defendant's motion for summary judgment, Plaintiff's cross-motion for summary judgment is obviously denied.

Civil Action No. DKC 2000-0637

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

DOMINIQUE K. GANTT

v.

SECURITY, USA, INC.

December 4, 2002

ORDER

For the reasons stated in the foregoing Memorandum Opinion, it is this 4th day of December, 2002, by the United States District: Court for the District of Maryland, ORDERED that:

1. Defendant's motion for summary judgment under FED. R . Civ . P. 56 BE, and the same hereby is, GRANTED;

2 Plaintiff's cross-motion for summary judgment under FED. R. Civ. P. 56 BE, and the same hereby IS, DENIED;

3. JUDGMENT BE, and the same hereby is, ENTERED in favor of Defendant Security USA, Inc., and against Plaintiff Dominique K. Gantt; and

4. The Clerk will transmit copies of the Memorandum Opinion and this Order to counsel for the parties and CLOSE this case.

DEBORAH K. CHASANOW
United States District Judge

Civil Action No. DKC 2000-637

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOMINIQUE K. GANTT

v.

SECURITY, USA, INC.

Filed January 8, 2001

MEMORANDUM OPINION

Pending before the court and ready for resolution is the motion to dismiss of Security, USA, Inc. ("Security USA").fn1 No hearing is deemed necessary and the court now rules pursuant to Local Rule 105.6. For the reasons that follow, the court will grant the motion in part and deny it in part.

I. Background

Plaintiff, Dominique Gantt, a Maryland resident and former employee of California-based company Security USA, asserts common law and sexual harassment claims against the company as a result of being kidnapped while at work and raped. Pursuant to a contract with the federal government, Security USA provided security for the Internal Revenue Service building in Lanham, Maryland. On or about November 6, 1999, Plaintiff obtained a protective order in the Circuit Court for Charles

County against her ex-boyfriend, Garry Sheppard, who had been harassing her to rekindle their relationship. The protective order precluded Sheppard from contacting Gantt anywhere, including her job. Gantt informed Security USA Project Manager Earl Wood of the protective order. Wood informed supervisory personnel that Gantt should be assigned to guard only "secured areas" to prevent Sheppard from gaining access to her while at work.

At some point in November 1996, Sgt. Angela Claggett, a security officer who supervised Gantt, transferred a call from Sheppard to Gantt. Upset by the call, Gantt told Wood about the incident, and the latter promised to speak with Claggett and tell her to refrain from transferring subsequent calls from Sheppard. Apparently, unbeknownst to Wood and others at Security USA, Claggett and Sheppard worked together during the week for another security company.fn2

On December 7, 1996, Claggett served as weekend supervisor and in that capacity assigned security officers to their posts. Claggett assigned Gantt to guard an underground garage, Post 9, an "outside post." Paper no. 16, ¶ 24. Within fifteen minutes of assuming her post, Gantt received a call from Sheppard. Afraid for her safety, Gantt notified Claggett of the telephone call and requested to be reassigned to a location inside the building as Wood had directed. Apparently disobeying Wood's orders, Claggett refused Gantt's request.
Within approximately 45 minutes of calling Gantt, Sheppard arrived at the facility, went to Post 9 and

proceeded toward Gantt. She ran and Sheppard pursued, pulling out a shotgun that he had concealed in his trench coat and shouting "run, run." Sheppard caught Gantt, grabbed her by her arm, pressed the shotgun to her face and put her in a choke hold. He then dragged her off the premises, allegedly in the presence of two other security guards.fn3 Sheppard forced Gantt into his van, drove her through the District of Columbia and other locations, threatened to kill her, assaulted and raped her. Sheppard held her captive for six hours, eventually surrendering to police after Gantt told him that she would reconcile with him and that she would tell police that she went with Sheppard willingly.fn4

One of the officers who witnessed the scene between Gantt and Sheppard reported it to Claggett and another Security USA officer, Darren Harvey. Harvey suggested to Claggett that they call the police, but Claggett allegedly told him there was no need because Sheppard only wanted to talk to Gantt. Someone eventually called the police.

Plaintiff filed this action in the Circuit Court for Prince Georges County.fn5 She then filed an amended complaint pro se, and subsequently obtained new counsel. The amended complaint contained a claim of sexual harassment/hostile work environment, and Defendant removed the case to this court.

Plaintiff alleges that as a result of the incident, she experiences recurring nightmares and "other mental health issues." Paper no. 16, ¶ 54. She

alleges that she has undergone medical evaluation. and suffered lost wages, and physical and mental injury. In addition to the sexual harassment claim (count II), she brings claims against Security USA for negligence, gross negligence and reckless disregard for human life and safety (count I): intentional, reckless and/or negligent infliction of emotional distress (count III), and negligent hiring, training, retention, supervision, discipline, and entrustment (count IV). Defendant has moved to dismiss all counts.

II. Standard of Review

A court reviewing a complaint in light of a Rule 12 (b) (6) motion accepts all well-pled allegations of the complaint as true and construes the facts and reasonable inferences derived there from in the light most favorable to the plaintiff. Ibarra v. United States, 120 F.3d 472, 473 (4th Cir. 1997). Such a motion ought not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court, however, need not accept unsupported legal allegations, Revene v. Charles County Comm'rs, 882 F.2d 870, 873 (4th Cir. 1989), or conclusory factual allegations devoid of any reference to actual events. United Black Firefighters v. Hirst, 604 F.2d 844, 847 (4th Cir. 1979).

III. Analysis

A. Common Law Tort Actions

With limited exceptions, the Maryland Worker's Compensation Act ("WCA"), MD. CODE ANN., LAB. & EMPL., 9-101, et seq., (Repl. Vol. 1999), provides the exclusive remedy for employees injured at work. Sec 9-509(a)-(b) ("[T]he liability of an employer under this title is exclusive . . . [and] the compensation provided under this title to a covered employee . . . is in place of any right of action against any person."); Hastings v. Mechalske, 336 Md. 663, 672, 650 A.2d 274, 278 (1994). The WCA reaches claims involving both intentional torts, Tynes v. Shoney's Inc., 867 F.Supp. 330, 331 (D.Md. 1994) (battery), and negligence, Brady v. Parsons Co., 327 Md. 275, 278, 609 A.2d 297, 298 (1992) (negligent failure to keep workplace safe). An employer must compensate a "covered" employeefn6 for any "accidental personal injury" the employee sustains regardless of fault as to the cause of the injury. 9501 (a) (1), (b) ; see also DeBusk v. John's Hopkins Hospital, 342 Md. 432, 437-38, 677 A.2d 73, 75 (1996) (WCA was designed to provide compensation to injured employees regardless of fault for injuries transpiring in the course of employment) (citing Queen v. Agger, 207 Md. 342, 343, 412 A. 2d 733, 733-34 (1980) ; Howard County Ass 'n for Retarded Citizens v. Walls, 288 Md. 526, 531, 418 A.2d 1210, 1214 (1980) ; Dethlehem-Sparrows Point Shipyard v. Damasiewicz, 187 Md. 474, 980, 50 A.2d 799, 802 (1947)). Any compensation awarded on this fault-free basis serves as a substitute for a common law tort action. Id.

An "accidental personal injury" occurs and the WCA applies when a third party willfully or negligently injures a covered employee in the course of the employment. 9-101 (b) (2); see Edgewood Nursing

Home v. Maxwell, 282 Md. 422, 384 A.2d 748 (1978) (applying the section to a nurse killed by her lover for reasons not related to her job) ; Giant Food, Inc. v. Gooch, 245 Md. 160, 165, 225 A.2d 431, 434 (1967) (interpreting the predecessor to 9-101 (b) (2) ; employee only need show he suffered his injury in the course of his employment for WCA to apply) ; see also Knoche v. Cox, 282 Md. 447, 454, 385 A.2d 1179, 1182 (1978) ("(A)n injury arises `in the course of employment` when it occurs within the period of employment at a place where the employee reasonably may be in the performance of his duties and while he is fulfilling those duties or engaged in doing something incident thereto.") (citations omitted).

It is undisputed that Gantt suffered her injuries at the hands of a third party, Sheppard, while at work, and that she was on duty at the time and expected to be at her post. Thus, Counts I and Iv of Gantt's complaint, which allege various negligence actions against Security USA, must fail as they clearly are preempted by 9-101(b)(2). Count III, Gantt's claim of intentional infliction of emotional distress, fares better.fn7

The WCA provides that

If a covered employee is injured or killed as the result of the deliberate intent of the employer to injure or kill the covered employee, the covered employee . . . may

(1) bring a claim for compensation under this title, or

(2) bring an action for damages against the employer.

§ 9-509(d). Thus, if the subsection applies, the employee may either file a claim under the WCA or bring a common law action for damages.

The Court of Appeals of Maryland has held that the exception outlined in § 9-509(d) applies if an employee commits a tort against another employee. Federated Department Stores Inc., v. Le, 324 Md. 71, 81, 595 A.2d 1067, 1072 (1991) (holding that a corporate defendant could be sued for, inter alia, intentional infliction of emotional distress, after store's security personnel coerced plaintiff into signing an allegedly untrue confession that he stole merchandise). Rejecting earlier cases decided by the Maryland Court of Special Appeals, the Court of Appeals in Le, Held that "for an employer to be held liable for the intentional torts of au employee committed within the scope of employment, the employee deed nor be the `alter ego' of the employer," id. at 85-86, 595 A.2d at 1074, and the employee's actions need not have been expressly authorized by the employer, id. (citing Sawyer v. Humphries, 322 Md. 247, 254-255, 587 A.2d 467, 470 (1991) ; Ennis v. Crenca, 322 Md. 285, 293, 587 A.2d 485, 489 (1991) ; Hopkins C. Co. v. Read Drug & C. Co., 124 Md. 210, 214, 92 A. 478, 479-80 (1914)).

While the court in Le stated that under the facts of that case, the exception applied, it pointed out that the exception was not so broad as to apply to every intentional tort committed by one employee against another. Id. at 87, 595 A.2d at 1075. Beyond that, the court offered no factors to guide courts in

determining when to apply the exception in such situations.fn8

To support her intentional infliction of emotional distress claim, Gantt contends that Claggett intentionally assigned her to Post 9 so that Sheppard could assault, kidnap and batter her. She further alleges that Claggett may have intentionally disengaged cameras placed near that post to prevent Sheppard from being detected and intentionally refused to call police after Gantt was kidnapped.fn9 Paper no. 24 at 10. Further, she asserts that Security USA ratified Claggett's actions. Cf. Le, 324 Md. at 77, 595 A.2d at 1070 (company defendant ratified tort-feasor employee's action by refusing to rehire plaintiff). She states that, even after Claggett disobeyed Wood's orders and failed to call police after Gantt's abduction, Security USA allowed Claggett to continue as Gantt's supervisor when Gantt returned to work. She also contends that Security USA failed to reprimand Claggett for her actions. Paper no. 24 at 12. Moreover, she asserts that Security USA had prior notice of Claggett's propensity to assist Sheppard because Claggett had previously disobeyed the protective order and transferred a call from Sheppard to Gantt. Finally, as a result of the incident, she claims that she suffers recurring nightmares and various mental health issues. Considering that the Maryland Court of Appeals in Le allowed a claim similar to the one advanced here to proceed, the court declines to dismiss Gantt's claim of intentional infliction of emotional distress.fn10

B. Sexual Harassment

Gantt also asserts a claim of sexual harassment, pursuant to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e, et seq., ("Title VII"), the due process clause of the Fifth Amendment, and Article 49B of the Maryland Civil Rights Act.

Gantt admits that she has failed to exhaust her administrative remedies, which is a prerequisite to bringing a discrimination claim under Title VII. Edelman v. Lynchburg College, 228 F.3d 503, 506 (4th Cir. 2000) (citing Taylor v. Virginia Union Univ.,193 F. 3d 219, 239 (4th Cir. 1999)). With respect to her state law claim, Article 49B does not create a private cause of action for sexual harassment. Hart v. Harbor Court Associates, 46 F.Supp.2d 441 (D.Md. 1999) (citing Maryland Commission on Human Relations v. Downey, 110 Md.App. 493, 540, 678 A.2d 55, 79 (1996); Childers v. Chesapeake and Potomac Telephone Co., 881 F.2d 1259, 1265 (4th Cir. 1989); Pritchett v. General Motors Corp., 650 F.Supp. 758, 761 (D.Md. 1986)).

Gantt acknowledges that she only can assert a claim of sexual harassment in violation of her Fifth Amendment rights if Defendant is a governmental actor. Plaintiff contends that under Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), Security USA's actions can be "fairly attributable" to the government. Paper no. 24 at 24. She basically contends that because Security USA's employees are located at federal buildings, because the

company is subject to numerous federal regulations, and because in the Washington, D.C. metropolitan area, the company receives primarily federal funding, it is a governmental actor. The court disagrees.

The sole fact that a private entity receives federal funding and is subject to considerable federal government regulations does not mean that the entity's actions can be attributed to the government. Morse v. North Coast Opportunities, Inc., 118 F.3d 1338, 1341 (9th Cir. 1997) (granting motion to dismiss, and holding that while it received most of its funding from and was substantially regulated by the federal government, private entity was not a federal governmental actor). Security USA's alleged sexual harassment was in no way compelled or influenced by the federal government or its regulations. See id. (discussing Rendell-Baker v. Kohn, 457 U.S. 830, 842-43 (1982), in which U.S. Supreme Court found that a school, although subject to extensive regulation, was not a state actor for purposes of § 1983 suit, as state regulations in no way compelled or influenced the decision to fire plaintiff). Moreover, while Gantt asserts that Security USA's security officers were stationed at federal buildings, and supervised by the federal protective service, she does not allege that the federal government benefited in any way from the company's alleged constitutional deprivations. Id. (holding that such a showing, when a private entity acts, is necessary to establish governmental action). Accordingly, Gantt's claim of sexual harassment based on any theory will be dismissed.

IV. Conclusion

For the foregoing reasons, Defendant's motion is granted in part, with respect to counts I, II, and IV, and denied in part, as to count III.

A separate Order will be entered.

DEBORAH K. CHASANOW
United States District Judge

Footnotes

fn1 Earlier complaints had named other defendants as well. Apparently, Plaintiff has dismissed claims against all other defendants in her First Amended Complaint.

fn2 Plaintiff alleges that Defendant "knew or should have known" that Claggett and Sheppard worked together. The only reasoning she gives in her complaint for this assertion is the fact that Claggett transferred the call to Gantt. Paper no. 16, ¶ 21.

fn3 Plaintiff does not appear to allege that these security officers worked for Security USA.

fn4 Plaintiff alleges that Sheppard was eventually convicted of kidnapping and rape and is presently serving 20 years for these crimes. Paper no. 16, ¶ 53.

fn5 Prior to filing her claims in state court, Plaintiff apparently filed a worker's compensation claim with respect to this matter. Plaintiff's counsel has

submitted a declaration stating that Security USA's former counsel informed her that the claim had been denied by Defendant's insurer. Paper no. 24, Plaintiff's exhibit A. Defendant, however contends that the claim was not denied, but that the insurance carrier has questioned whether the injuries arose out of and occurred in the course of employment, and that Plaintiff has failed to address those issues. Paper no. 28 at 1.

fn6 Gantt does not dispute that she was a covered employee on December 7, 1996.

fn7 Gantt also asserts a claim of "reckless and/or negligent infliction of emotional distress," which Maryland does not recognize. Beynon v. Montgomery Cablevision Ltd. Partnership, 351 Md. 460, 467, 718 A.2d 1161, 1.165 (1998). Even if Maryland recognized such a tort action, it would be barred for the reasons previously explained.

fn8 While Maryland courts have offered little guidance on this issue, at least one federal court has. Tynes v. Shoney's Inc., 867 F.Supp 330 (D.Md. 1994) dealt with a case similar to Gantt's, in that an employee sought to bring an action against his employer for battery, defamation, and wrongful discharge after he was pushed by his supervisor and fired. The court acknowledged that it will be up to the Court of Appeals of Maryland to determine the factors to consider when deciding whether an employee's intentional wrongdoing can be attributed to an employer. The court proceeded, however, to offer that such factors would likely include: "(1) the status of the employee in the

corporate (or other) hierarchy o£ the employer; (2) the patent to which his wrongful conduct could be expected to flow from his position; (3) the nature of the wrongdoing; and (4) any prior notice that the employer had of the employee's proclivity to do wrong." With respect to the battery claim, the court in Tynes ultimately determined that the plaintiff had produced insufficient evidence to satisfy § 9-509(d) and show that the employer deliberately intended to injure him. That court, however, was deciding a motion for summary judgment, not as here, a motion to dismiss for failure to state a claim.

fn9 Defendant apparently declines to argue that Claggett was not acting within the scope of her employment on December 7, 1996.

fn10To circumvent the exclusivity provisions of the WCA, Gantt also argues that once she ran from her post, she was no longer only an employee of Security USA, but rather "a person on the premises in need of rescue from physical harm." Paper no. 24 at 21. Thus, under the "dual capacity" doctrine, Security USA owed Gantt a duty as a person in need of protection. The court rejects this argument, as the Maryland Court of Appeals recently held the dual capacity doctrine to be inconsistent with Maryland law. Suburban Hosp., Inc., v. Kirson, No. 2, 2000 WL 1801529, at *15 (Dec. 8, 2000) .

Civil Action No. DKC 2000-637
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

DOMINIQUE K. GANTT

v.

SECURITY, USA, INC.

Filed January 8, 2001

ORDER

For the reasons stated in the foregoing Memorandum Opinion, IT IS this 8th day of January, 2001, by the United States District Court for the District of Maryland, ORDERED that:

1. Defendant's Motion to Dismiss BE, and the same hereby IS, GRANTED in part and DENIED in part;

2. The Motion to Dismiss by Defendant Security USA, Inc. BE, and the same hereby IS, DENIED with respect to count III (intentional infliction of emotional distress);

3. The claims against Defendant Security USA Inc. in counts I, II, III (reckless or negligent infliction of emotional distress), and IV of the First Amended Complaint BE, and the same hereby ARE, DISMISSED; and

4. The clerk will transmit copies of the Memorandum Opinion and this Order to counsel for the parties.

DEBORAH K. CHASANOW
United States District Judge

No. 03-1033
CA-00-637-8-DKC

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DOMINIQUE K. GANTT
Plaintiff-Appellant

v.

SECURITY, USA, INCORPORATED
Corporate Office
Defendant-Appellee

and

VSI, INCORPORATED, formerly known as Security, USA, Incorporated, its agents, employees and representatives; TIM WELDON, President; ANGELIA CLAGGETT, Shift Supervisor; GARY SHEPPARD, Inmate # 266463; EARL WOOD, Project Manager and Resident Agent
Defendants

February 20, 2004 Filed

On Petitions for Rehearing and Rehearing En Banc

The parties' petitions for rehearing and rehearing en banc were submitted to this Court. As no member of this Court or the panel requested polls on the petitions for rehearing en banc, and

As the panel considered the petitions for rehearing and is of the opinion that they should be denied,

IT IS ORDERED that the petitions for rehearing and rehearing en banc are denied.

Entered for a panel comprised of Judge Niemeyer, Judge Luttig, and Judge Motz.

For the Court,

Patricia S. Connor,
CLERK

RELEVANT STATUTES AND REGULATIONS

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment of the United States Constitution provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifth Amendment of the United States Constitution provides, in relevant part:

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42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

No. 03-1600

Supreme Court, U.S.
FILED
JUL - 1 2004
OFFICE OF THE CLERK

In The

Supreme Court of the United States

DOMINIQUE K. GANTT,
Petitioner,

v.

SECURITY, USA, INCORPORATED,
Corporate Office
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether Respondent, Security, USA, Inc. ("Security USA"), a privately owned and operated company that contracted with the federal government to provide security services to a federal building, is subject to liability for alleged Fifth Amendment violations of its employees because it was performing security services for a federal building.

2. Whether the U.S. Court of Appeals for the Fourth Circuit erred, as a matter of law, in affirming summary judgment in favor of Security USA on the claim filed by Petitioner, Dominique Gantt ("Gantt"), for intentional infliction of emotional distress resulting from her alleged abduction, assault, and rape at the hands of a non-employee, and in denying summary judgment to Security USA for the portion of such claim related to her assignment to an outside security post prior to such abduction.

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Factual Background[1]

Security USA is a privately owned and operated company, which contracted with the General Services Administration ("GSA") to provide security services to the Internal Revenue Service ("IRS") building in Lanham, Maryland. (Pet. Brief at 1-2). Gantt was employed by Security USA as a security guard during November and December of 1996, the relevant time period in this case. (Pet. Brief App. (hereinafter "App.") at 2a-3a). On November 6, 1996, Gantt obtained a protective order barring her ex-boyfriend, Gary Sheppard, from having any contact with her. (App. at 3a). Sheppard was not an employee of Security USA. *Id.* Gantt alleges that she told her employer, Security USA, about the order. *Id.*

Gantt says that one of her direct supervisors, Angela Claggett, knew Sheppard personally, and the reasons the protective order was imposed. (Pet. Brief

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[1] This summary of the facts is excerpted from the facts as they were presented to the Fourth Circuit, which reviewed the district court's granting of Security USA's motion to dismiss Gantt's constitutional claim and the granting of Security USA's summary judgment motion on the intentional infliction of emotional distress claim. Thus, as required, Gantt's version of the events is accepted for purposes of this appeal only. Security USA, however, does not concede that Gantt's allegations are true and, in fact, disputes them.

at 3). Nevertheless, according to Gantt, on December 7, 1996, Claggett transferred a telephone call from Sheppard to Gantt, and assigned her to an outside post at the IRS building. (App. at 4a-5a). Gantt was stationed at the post for approximately an hour when Sheppard arrived at the IRS building and abducted Gantt at gunpoint. (App. at 5a-6a). Gantt alleges that Claggett did not immediately call the police. (Pet. Brief at 5). After several hours, Sheppard surrendered to police. (App. at 7a). Sheppard was convicted of kidnapping, first degree rape, and violation of the restraining order, and is currently serving twenty years in state prison.

Procedural History

Slightly less than three years after the events described above, Gantt filed her initial suit against Security USA and others, claiming violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et. seq.* ("Title VII"), Maryland law and the Fifth Amendment of the U.S. Constitution. In May of 2000, Gantt filed her First Amended Complaint ("Complaint") in the United States District Court for the District of Maryland. In her Complaint, Gantt alleged four counts against her former employer, Security USA: negligence, gross negligence and reckless disregard for human life and safety (Count I); "sexual harassment/hostile work environment" (Count II); intentional, reckless and/or negligent infliction of emotional distress (Count III); and negligent hiring, training, retention, supervision, discipline and entrustment (Count IV). Security USA filed a motion

to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure with respect to all Counts.

On January 8, 2001, the district court granted Security USA's motion to dismiss with respect to Counts I, II,[2] and IV, but denied the motion to dismiss with respect to Count III, finding that Gantt's allegations, as pled, were sufficient to state a claim for intentional infliction of emotional distress.

Following discovery on the emotional distress claim (Count III), both parties moved for summary judgment. On December 4, 2002, the district court denied Gantt's motion for summary judgment and granted Security USA's motion for summary judgment, dismissing Count III, and thus, the entire case. Gantt appealed to the Fourth Circuit, challenging the district court's dismissal of her sexual harassment claim (Count II) and her claim of intentional infliction of emotional distress (Count III).

The Fourth Circuit concluded that the district court properly dismissed Gantt's constitutional sexual harassment claims against Security USA. The court determined, in accordance with *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), "[i]ndisputably, [Security USA] is a private entity; therefore no *Bivens* claim lies against the company." 356 F.3d at 552; *see*

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2 Count II of Gantt's Complaint alleged only a violation of the "equal protection guaranties of the due process clause of the Fifth Amendment of the United States Constitution." *See* App. at 60a. Nevertheless, Gantt asserted to the Fourth Circuit, and continues to assert before this Court, that her claim under Count II also arises under the Fourteenth Amendment and 42 US.C. § 1983 ("§ 1983").

also Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971). The Fourth Circuit also disregarded Gantt's claims based on the Fourteenth Amendment and § 1983 because they were raised for the first time on appeal, thus they were not properly before the court. Moreover, the Fourth Circuit noted that even if the issues were properly raised and preserved for appeal, the Gantt failed to produce sufficient evidence that Security USA was a "state [as opposed to federal] actor." *Id.* at 552 n. 1.

Turning to the emotional distress claim, the Fourth Circuit affirmed the grant of summary judgment for Security USA on the emotional distress claim growing out of the abduction and rape by Sheppard; however, the court reinstated Gantt's claim based on the alleged intentional assignment of Gantt to an outside post at the IRS building and the alleged emotional distress suffered by Gantt prior to Sheppard's arrival. The court thus reversed and remanded to the district court for further proceedings on that portion of the claim.

Gantt is now seeking the review of the United States Supreme Court of her sexual harassment claim, which she has categorized as either a Fifth or Fourteenth Amendment violation. She is also seeking review of the Fourth Circuit's decision to uphold summary judgment in Security USA's favor on her claimed emotional distress resulting from the abduction, assault, and rape by Sheppard.

SUMMARY OF ARGUMENT

This Court should leave undisturbed, by denying certiorari, the decision below of the Fourth Circuit. Gantt has not provided this Court with any valid reason for granting her petition for certiorari.[3] She has failed to allege any reason for invoking this Court's certiorari jurisdiction beyond her contention that the Fourth Circuit erred in its decision of the case. Gantt ignores Supreme Court Rule 10[4] and fails to identify any reason comparable to the reasons set forth therein for this Court to exercise its discretion and grant a writ of certiorari. At best, Gantt claims that the lower courts made erroneous findings as to undisputed facts and misapplied rules of law. Rule 10 makes clear that a "petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." This is not one of those rare cases where a

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[3] In fact, much of Gantt's quite lengthy petition is merely her arguments on the substantive merits of her claims. She has not adequately raised or addressed reasons why these claims are worthy of review by this Court.

[4] Supreme Court Rule 10 states, in pertinent part: "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." The Rule then continues by enumerating a non-exhaustive, but nonetheless relevant, list of reasons for review that the Court regularly considers. This list includes various judicial conflicts, an issue of national importance, or an exercise of supervisory power to review a lower court decision that severely departs from the "accepted and usual course of judicial proceedings."

petition should be granted. Gantt's request for a writ of certiorari should be summarily denied.

REASONS TO DENY THE PETITON

I. Gantt has failed to identify an issue of national importance worthy of this Court's review.

Review by this Court on writ of certiorari is a matter of judicial discretion, which will be granted only when there are special and important reasons for review. SUP. CT. R. 10. One of the factors considered by this Court is whether the issues presented are novel. *See, e.g., Times Film Corp. v. Chicago*, 365 U.S. 43 (1960) ("The petition for certiorari presents novel questions of importance . . ."). Additionally, this Court does not sit for the benefit of any particular litigant. *See Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) ("jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing"). There must be some issue of national importance. *Id.*

In this case, the ruling arose in an uncommon factual context, did not establish any rule of law affecting other cases and did not address an important issue of federal decisional, statutory, or constitutional law. It therefore does not meet the criteria for review, as found in Rule 10.

Nevertheless, in her effort to obtain review by this Court, Gantt has attempted to characterize the issue of whether an employer can be held liable for the

for the harassment of its employees by non-employees and the imposition of civil liability for the allowance or facilitation of workplace violence against women as novel issues of national importance. (Pet. Brief at i, ii). However, whether these are issues of national importance is irrelevant to the grant or denial of review in this case.

The constitutional issues presented to the Court concern only whether a private employer can be considered a government actor, and thus be subject to claims for Fifth Amendment violations. This is an issue that has been addressed, and resolved, by this and other courts, without resulting conflict. *See* Argument II, *infra*. It is therefore not a novel issue in need of addressing by this Court at this time.[5]

Gantt's attempt at converting the issue of whether a private security company is subject to the Fifth Amendment as a "government actor" to an issue of national importance is without support or merit. Gantt asserts that "[t]he United States Department of

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[5] As to the broader issue of employer liability for employee harassment by a non-employee, the lower courts in this case did not dispute that accepted legal principle. Thus, Gantt's contention that because the Supreme Court has yet to address such issue, it is "novel" and worthy of review must fail. Gantt herself notes that all courts that have addressed the issue have come to the same conclusion, i.e., employer may be liable for the harassment of employees by non-employees in certain circumstances. (Pet. Brief at 10). Thus, there is no split of authority and review by this Court is unnecessary.

Homeland Security is offering, and will continue to offer, many new contract to private security companies . . ." (Pet. Brief at iii). Gantt further claims that "[p]rivate security companies are increasingly assuming the public function of policing." *Id.* Thus, Gantt's expansive factual contention is that there is a growing trend towards privatization of security forces in general. However, Gantt fails to cite any authority for this broad claim.

Contrary to Gantt's contentions, since the events of September 11, 2001, the converse holds true. In light of current national security concerns, policymakers are *withdrawing* support for new privatization projects and shifting that support toward increase *federalization*.[6] With the creation of the Department of Homeland Security, the federal government is asserting more direct control over security functions, and persons carrying out these functions are increasingly federal

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[6] *See e.g.*, Aviation and Transportation Security Act, Pub. L. No. 107-71, § 101(a), 115 Stat. 597, 597 (2001) (codified in scattered sections of 49 U.S.C.; 5 U.S.C. §§ 5313, 8331; 26 U.S.C. § 9502; 31 U.S.C. § 1105) (providing a detailed and comprehensive scheme under which the federal government will exert greater control over airport security, and creates a new federal workforce to implement the security scheme); Ellyn Ferguson, *Michigan Lawmakers Vote for Airport Security Bill*, Gannett News Service (Nov. 16, 2001) (quoting Representative Vernon J. Ehlers as saying "[t]he major gain in the bill (the bill that became the Aviation and Transportation Security Act) is that we have federal control of the (security) process.")

employees.[7] In fact, the executive branch most recently proposed a complete federalization of all security forces at the nation's nuclear facilities.[8]

This increased movement toward federalization rather than privatization of security forces refutes Gantt's argument that there is an increased need to "clearly set forth the legal responsibilities of . . . private companies . . . performing a government function." (Pet. Brief at iii). In the security context, Congress and the Executive through the political process have begun to assume "the legal responsibilities . . . to hire, train, and manage their employees in a manner consistent with the responsibilities of performing a government function." *Id.*

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[7] *See* TSA Begins the Federalization Process at More Airports *at* http://www. dot.gov/affairs/tsa5802.htm (July 15, 2002) (last visited June 23, 2004); *see also* Air Marshall Program Could Create Thousands of New Federal Jobs *at* http://www.govexec.com/dailyfed/0901/092501g3.htm (September 25, 2001) (last visited June 23, 2004) (reporting that Transportation Secretary Norman Mineta estimates that new security measures will require an increased federal expense of $1.8 billion and will likely add 28,000 federal employees to the payroll).

[8] *See* Energy Department Moves to Boost Security at Nuclear Labs *at* http://www.govexec.com/dailyfed/0504/0501004gsn1.htm (May 10, 2004) (last visited June 23, 2004) (reporting on Energy Secretary Spencer Abraham's speech in Aiken, South Carolina where the Secretary announced plans to federalize security forces at nuclear plants and labs and even proposed the creation of a federal special operations force to act as a counter-terrorism strike force).

Even if this Court does accept the proposition that there is an issue of national importance, this case presents a poor vehicle for addressing that issue. Gantt claims that the issue of private security companies assuming public function of policing is "timely" under the circumstances in this post-9/11 society. (*See* Pet. Brief at iii). Although Security USA contends, and supports its contention, that this is fact not true, whether it is true, and whether it presents an issue for review by this Court is irrelevant. The events that gave rise to the causes of action asserted by Gantt occurred in 1996, well before September 11, 2001. Thus, the facts of this case bear no relation to the state of society post-9/11. The importance of Homeland Security increasing private contracting of security details to vulnerable locations is not adequately presented by this case, and cannot support a grant of certiorari.

Since Gantt fails to raise any nationally important issue with respect to her Fifth Amendment claim, or any other valid reason upon which to grant review of her case, her petition for certiorari should be denied.

II. There is no need for this Court to "clarify" its holding in *Correctional Services Corp. v. Malesko*, 534 U.S. 61 (2001), that *Bivens* claims are not available against private companies.

In *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971), this Court created a cause of action for damages against federal officers who violate an individual's Fourth Amendment rights. In *Correctional*

Services Corp. v. Malesko, 534 U.S. 61 (2001), this Court ruled that *Bivens* should not be extended to allow constitutional suits against private companies performing contracts for the federal government. Gantt claims that this case "offers the Court the opportunity to clarify its holding in [*Malesko*]." (Pet. Brief at iv.) Without citing any authority, Gantt asserts that "[l]ower courts are currently unclear as to whether how extensively [sic] *Malesko* has limited *Bivens*." (*Id.*)

Gantt's invoking of *Malesko* as a basis for granting certiorari is misplaced for several reasons. First, Gantt has not asserted, much less substantiated, that the Fourth Circuit "has decided an important federal question in a way that conflicts with relevant decisions of this Court [i.e. *Malesko*]." SUP. CT. R. 10(c). In fact, Gantt seems to agree that the Fourth Circuit's interpretation of the ruling in *Malesko* was correct. Gantt merely argues that the Fourth Circuit "misunderstood the *timing* of the district court's dismissal of the claim and this Court's issuance of *Malesko*." (Pet. Brief at 16; emphasis added.) The timing of the decisions is irrelevant. The district court properly found, pre-*Malesko*, that a constitutional tort claim does not lie against a private company performing services for the federal government. The Fourth Circuit, post-*Malesko*, correctly affirmed the district court's decision. *Gantt*, 356 F.3d at 552. The result has been consistent throughout: Gantt does not have a constitutional cause of action against her employer, a private company. Thus, there is no conflict with *Malesko* warranting review by this Court.

Second, Gantt does not quarrel with the ruling in *Malesko* that *Bivens* does not apply to private companies. (Pet. Brief at 16.) Rather, Gantt "only asks that this Court acknowledge that [Security USA] is a government actor, allowing her to sue, as can a government employee, under the Equal Protection Clause of the Fourteenth Amendment." *Id.* However, under this Court's Rules, "[a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. At best, Gantt's plea for this Court to "acknowledge that [Security USA] is a government actor" is merely an assertion that the Fourth Circuit made incorrect factual findings, or that the Fourth Circuit misapplied *Malesko*. Such assertions are not sufficient reasons to grant certiorari.

Third, Gantt's claim that this case is "distinguished" from *Malesko* is incorrect. (Pet. Brief at 16.) Rather, the opposite is true: this case is identical to *Malesko* on all material points. In *Malesko*, the plaintiff was a federal prisoner being held in a halfway house operated by a private company. 534 U.S. at 63-64. The use of private contractors to operate such facilities is extensive. *Id.* at 63 n.1. The private contractor at issue was subject to extensive government regulation and oversight. *Id.* at 71 n.5. The plaintiff, who suffered from a heart condition, had a special exemption from the company's requirement that all detainees below the fifth floor take the stairs to their rooms. *Id.* at 64. Notwithstanding the undisputed acceptance of the plaintiff's exemption among the company's managers, a particular supervisor disregarded the exemption and

ordered the plaintiff to take the stairs. The plaintiff had a heart attack and suffered injuries. *Id.* The plaintiff had an alternative remedy but missed the statute of limitations, and brought his *Bivens* claim as a last-ditch attempt to recover damages from the private company. *Id.* at 72. Gantt's case is identical: She alleges that Security USA is a government actor because of the widespread use of private companies to perform security functions and the extensive oversight by the Federal Protective Service; she alleges that an individual supervisor disregarded her exemption to the outside posting assignments; and she had an alternative, well-established remedy against her employer (Title VII), but missed the filing deadline. (*See* Pet. Brief at 15 n.2.) Rather than identify a conflict with *Malesko*, Gantt demonstrates that her case is the same as *Malesko*. Thus, the Fourth Circuit correctly relied on *Malesko* in dismissing her constitutional claim.

Finally, Gantt claims, without citation to authority, that lower courts are "currently unclear" as to how to apply *Bivens* following *Malesko*. (Pet. Brief at iv.) To the contrary, the courts of appeals seem to have no trouble applying the *Malesko* ruling and mandate that *Bivens* claims do not lie against private government contractors and that courts should be reluctant to imply causes of action where Congress has not specifically created them. *See, e.g., Stoutt v. Banco Popular de Puerto Rico*, 320 F.3d 26, 33 (1st Cir. 2003); *John Street Leasehold, LLC v. Capital Management Resources, L.P.*, 283 F.3d 73, 75 (2d Cir.), *cert. denied sub nom. John Street Leasehold, LLC v. F.D.I.C.*, 537 U.S. 883 (2002); *Gantt v. Security USA, Inc.*, 356 F.3d 547, 552 (4th Cir. 2004); *Muick v. Glenayre Electronics*, 280 F.3d 741,

742 (7th Cir. 2002); *Sinclair v. Hawke*, 314 F.3d 934, 940-42 (8th Cir. 2003); *Libas, Ltd. v. Carillo*, 329 F.3d 1128, 1130 (9th Cir. 2003); *Cicippio-Puleo v. Islamic Republic of Iran*, 353 F.3d 1024, 1033 (D.C. Cir. 2004).

Gantt offers no legitimate reason why this Court should grant certiorari in this case to revisit *Malesko*. Gantt's petition for certiorari should be denied.

III. Gantt failed to properly raise and preserve her Fourteenth Amendment and § 1983 claims for appeal, thus they are not issues proper for review by this Court.

Gantt's attempt to raise the issue of Fourteenth Amendment liability for a private employer must fail, as Gantt failed to properly preserve that issue for appeal. The Fourth Circuit dismissed, in a footnote, Gantt's institution of a claim pursuant to the Fourteenth Amendment. The court stated

> On appeal, Gantt seeks to widen the legal basis of her constitutional claim, contending that she has alleged a "violation of the Fifth and Fourteenth Amendments of the Constitution, guaranteeing equal protection under the law pursuant to 42 U.S.C. § 1983." Brief of Appellant at 14. We must reject this contention. Not only has Gantt failed to invoke the Fourteenth Amendment or § 1983 in her complaint, but she has also failed to assert any facts in the complaint

> giving rise to Security USA's liability as a *state* actor. Rather, Gantt's case for *governmental action hinges on her* allegations that Security USA acted under color of *federal* law. Moreover, the arguments Gantt asserts in her appellate briefs would not establish state action, even if she had alleged the necessary underlying facts in her complaint.

Gantt v. Security, USA, Inc., 356 F.3d 547, 552 n. 1 (4th Cir. 2004) (emphasis in original). Accordingly, it has been established that Gantt failed to properly raise this issue before the district court. It cannot be litigated for the first time on appeal. Therefore, even if the writ is granted, this issue has not been preserved for appeal and would not be properly before this Court. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981). Simply put, the issue was raised too late. Certiorari should therefore be denied as to Gantt's Fourteenth Amendment and § 1983 claims.

IV. Correction of perceived errors by the court of appeals does not provide a proper basis for review by this Court.

Even if the Gantt had properly raised and preserved its Fourteenth Amendment issue for review, she presents no reason why this Court should address that question, other than to correct alleged error in this particular case. Similarly, Gantt advances no compelling reason, other than the correction of a

perceived error in application of prior precedent concerning private entities as government actors for purposes of imposing Fifth Amendment liability. She simply has failed to provide a proper basis for granting certiorari on these issues. She has identified no error in the legal standard applied by the Fourth Circuit and does not claim that the standard is in conflict with any decision of this Court or the other courts of appeal. SUP. CT. R. 10. Gantt simply asks this court to expend its limited resources correcting alleged errors in the Fourth Circuit's application of the legal standard for liability of a private company under color of law to the particular facts of this case. First, no such errors exist on the record of this case, as the Fourth Circuit's opinion was decided correctly on the merits under all of Gantt's asserted theories of recovery. And second, it is not the function of this Court to engage in error correction in individual cases. *See Id.*

V. Gantt's attempt to seek review by this Court of the Fourth Circuit's decision on the merits of her state emotional distress claims are inappropriate and certiorari should be denied.

Gantt seeks to have this Court review the decision of the Fourth Circuit concerning the merits of her state law emotional distress claim. However, her petition for certiorari does not identify any accepted basis for review of this decision. Rather, Gantt is simply asking this Court to substitute its judgment for that of the Fourth Circuit on a question of state law. First, a petition for writ of certiorari is "rarely granted when the asserted error consists of erroneous factual

findings ..." SUP. CT. R. 10. Such case specific error correction does not fall within this Court's certiorari jurisdiction. *See id.* More importantly, Gantt's emotional distress claims consist wholly of issues of state law. *See Gantt*, 356 F.3d at 552-56 (citing Maryland cases and statutes). No authority is proffered by Gantt for this request for invocation of Supreme Court supervisory power to review a matter of state law, and Security USA is aware of none "This Court's supervisory power over federal courts allows the Court to intervene to protect the integrity of the *federal* system." *Frasier v. Heebe*, 482 U.S. 648 (1987) (emphasis added). Because the integrity of the federal court system is not at risk in this case, this Court should deny certiorari.

CONCLUSION

For the foregoing reasons, and specifically because Gantt offered no "compelling reasons" for this Court to exercise its discretionary power to grant a writ of certiorari, as required by Supreme Court Rule 10, and because the Court of Appeals correctly applied existing law to Gantt's claims, Gantt's request for a writ of certiorari should be denied.

Respectfully submitted,

SECURITY, USA, INCORPORATED

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Fifth Amendment to United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to United States Constitution

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.